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Harmful Offense to Others: A New Liberty-Limiting Principle and the 'New' Child Pornography

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*Harmful Offense to Others:
A New Liberty-Limiting Principle and the 'New' Child Pornography*

An honors thesis submitted in partial fulfillment of the requirement
for the degree of Bachelors of Arts in Philosophy from
The College of William and Mary

by
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Accepted for _____
(Honors, High Honors, Highest Honors)

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Introduction

“I hasten to point out, however, that there remains a great deal of unresolved confusion in the literature over the extension of both ‘offensiveness’ and ‘harmfulness,’ i.e., is the set of all offensive things a subset of harmful things, does it merely intersect with the set of harmful things, or are the two wholly distinct? Obviously the way in which this question is answered will have a bearing on just how many principles justifying coercive legislation liberals generally adhere to. Indeed, this has been a nettlesome problem for some time, a problem that can be traced back to Mill’s famous ‘exception’ to the Harm Principle allowing for legislation to prohibit ‘offenses against indecency.’ ”

David Shoemaker¹

The basic aim of this work is to resolve the “great deal of confusion” that exists about the relationship between harmfulness and offensiveness. Specifically, this work argues that an acceptance of liberalism’s basic model of harm and offense (as justifications for the legitimate use of the criminal law) requires an acceptance of the relationship between harm and offense expounded here. I do not attempt to argue for accepting the harm and offense principles over the sovereignty (or any other) principle; instead, I argue for its necessity *if* one subscribes to basic models of harm and offense. On a broader note, the overarching purpose of this work is to extend the current literature on the principles that demarcate legitimate from illegitimate criminal law. Legitimate criminal law prescriptively defines the realm of actions and behaviors that the liberal

¹ David Shoemaker, “Dirty Words and the Offense Principle,” *Law and Philosophy* 19 (Kluwer Academic Publishers, 2000), p. 545.

state may choose to criminalize (e.g., assault, rape, murder), whereas the illegitimate arena defines that conduct which must be protected from criminalization by the state (e.g., merely offensive thoughts, revolutionary ideas). It is important to note that legitimacy constrains what the liberal state *may* criminalize; however, it leaves open to practical considerations the criminalization of what *will* fall within the legitimate realm of the criminal law. There are many examples of activities that may appropriately satisfy the liberal society's principles of legitimate criminalization, but which criminal law may be ineffective in handling; the harms of secondhand cigarette smoke is one such example.

What is the context of this discussion of harmfulness, offensiveness, liberty, and the criminal laws? It is the liberal society whose ultimate *telos* or end is to guarantee individual liberty and equal opportunity for individuals to pursue any allowable belief-system. In such a liberal state, there are general principles that underlie the legitimate criminalization of specific activities. The two most well-known principles are the "harm to others" principle and the "offense to others" principle. The "harm to others" principle states that conduct causing wrongful harm to others is always a legitimate reason for the criminalization of such conduct. The "offense to others" principle states that conduct causing wrongful offense to others is always a legitimate reason for the criminalization of such conduct. In the *extreme liberal position*, only the harm principle guides the creation of the criminal law; in the *liberal position*, both the harm and offense principles underlie state coercion of liberty.

It is important to note that the current literature on the relationship between harmfulness and offensiveness is – at best – scarce; indeed, the very lack of scholarly examination might be the source of the existing confusion. Most notably, A.P. Simester

and Andrew von Hirsch suggested underlying distinctions between harm and offense in their article “Rethinking the Offense Principle.” They claim that:

... [H]arm involves the impairment of a person’s opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen goals. In this sense, harm is *prospective* rather than backward-looking; it involves a diminution of one’s opportunities to enjoy or pursue a good life.²

By contrast, at least paradigmatically, offensive behavior does not reduce a person’s opportunities or frustrate his goals. Rather, it causes the victim distress without adversely affecting the sorts of interests that are the concern of the Harm Principle. ... In this sense, offense is *experiential* rather than forward-looking: the affront suffered by V need not, though it may, suffer the cessation of the offensive conduct. Hence offended states are not in themselves a harm, since they do not necessarily imply any prospective loss of opportunity on the part of the victim. ... They do not, in other words, set back our interests.³

In chapter 2, I discuss how Simester and von Hirsch’s distinction applies to the concept of harmful offensiveness, and where the flaws in their distinctions lie.

This work attempts to transcend recent analyses of the relationship between harm and offense. In doing so, it goes beyond the current philosophical mainstream of modern social and legal ethics by developing a systematic understanding of a particular problem rather than focusing on a solution that applies only to a narrowly-tailored niche. I aim to provide answers to many central questions including:

- Are Joel Feinberg’s distinctions among harms, hurts, and offenses consistent with his use of the harm and offense principles? Do they resonate with our considered judgments? How does (or should) the notion of reasonableness play into offenses generally as well as the application of a liberal offense principle?

² A.P Simester and Andrew von Hirsch, “Rethinking the Offense Principle,” *Legal Theory* 8 (2002), p. 281., emphasis added

³ Ibid., emphasis added

- Are there activities which may not be criminalized under the harm or offense principles, but that should be criminalized (per our considered judgments)? In light of an overlap between harm and offense, should those activities in the overlap be subject to regulation and why? If so, should they be governed by the harm principle? The offense principle? An entirely new principle?
- How does Feinberg's account of harm and offenses, constructed in the late 1980s, handle more contemporary cases of harm and offense, specifically the "new" child pornography that has evolved in the past decade?

I will navigate the overlap between harm and offense by employing a similar method to Joel Feinberg in his four-volume series, *The Moral Limits of the Criminal Law*. My thesis does not implore the necessity of any higher-order morality (e.g., Millian utilitarianism or Kantian deontology) to justify its argumentation; rather, we will seek to maintain the reflective dynamic equilibrium between our practical, considered judgments and the theoretical abstractions we explore. Much like Feinberg's works, this is not intended to serve as a practical guide by answering social science questions or arguing for (or against) empirical claims. Instead, my thesis generally aims to be practical through its clarifying conceptual boundaries of harm and offense and the general principles which underlie public policy.

My work is divided into two parts. In Part I, I propose an original model for the relationship between harms and offenses, using Feinberg's *magnum opus* as an initial guide. After arguing for a revised harm-offense model, I propose a new liberty-limiting principle to guide criminalization of the established overlap between harm and offense. In Part II, the proposed model will be applied to recent legislation concerning the private

possession of a new type of child pornography. Since the second part functions as a contemporary application of the proposed modern, empirical evidence must be included and questions of social science must be addressed.

It is essential that the reader retain the focused image of the forest on his retina while navigating the trees, so to speak, throughout this construction of a new liberty-limiting principle. A thorough background of Feinberg's work is first necessary (Chapter 1). Then, two seemingly-unrelated concerns about Feinberg's model of harm and offense will be explained (Chapters 2 and 3) and each of these concerns will be used to strengthen and lay out the new liberty-limiting principle (Chapter 4).

Part I: A Harmful Offense Principle

Chapter 1: Harms, Hurts, and Offenses

In *The Moral Limits of the Criminal Law*, Joel Feinberg seeks to distinguish the different categories of what the public might refer to as the underlying reasoning of the criminal law, and to show how these different conceptions factor into the regulation of individual liberties vis-à-vis the criminal law. To accomplish this, Feinberg divides actions into those that are “hurtful to others,” “harmful to others,” and “offensive to others.” As we shall see, Feinberg argues that only the latter two categories of actions may be rightly criminalized under their respective liberty-limiting principles. To illustrate how legitimate criminalization of conduct is achieved through those principles, it is first necessary to understand Feinberg’s distinctions among harms, hurts, and offenses.

Feinberg’s Basic Distinctions

According to Feinberg, “harm” refers to “those states of set-back interest that are the consequence of wrongful acts or omissions by others.”⁴ Harm is constituted by a (1) wrongful (2) setback (3) of someone’s welfare interests (4) without defensibility or justification.⁵ By *wrongful*, Feinberg refers to the violation of that person’s *rights*. Rather than assessing a *right* as natural or legal, Feinberg analyzes it as a “valid claim against another’s conduct.”⁶ What gives rise to such valid claims? Feinberg argues that any

⁴ Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York: Oxford, 1984), p. 215.

⁵ Ibid., p. 106

⁶ Ibid., p. 215

welfare interest itself gives rise to claims against others.⁷ Generally speaking, welfare interests themselves serve as the grounds for “valid claims against others,” or rights.

By *interests* Feinberg means the narrow class of welfare interests (distinguished from other interests and non-interests, such as “passing wants,” instrumental wants,” and “focal aims”/“ulterior interests”).⁸ Welfare interests are interests in “maintaining that minimum levels of physical and mental health, material resources, economic assets, and political liberty that are necessary if we are to have any chance at all of achieving our higher good or well-being, as determined by our more ulterior goals.”⁹ Examples of welfare interests include one’s bodily autonomy, individual privacy, and preservation of one’s private property. Welfare interests that can be protected by the criminal law need not be restricted to only *personal stakes*, but also includes two types of public interests: community and governmental interests. Community interests are those “so widely shared” by individuals that can be ascribed to the community itself, such as public peace and health, “security from foreign enemies, and a sound economy.”¹⁰ Governmental interests encompass those interests that are *ipso facto* created by the act of governing, such as revenue collection, pursuing legal justice through court proceedings, and so forth. Feinberg concludes that, while these public interests are ultimately individuals’ interests, violations of governmental and community interests may be protected by the criminal law.

⁷ Feinberg does make an exception to this generalization that any interest itself constitutes a reason for claims against others, such as the (albeit doubtful) existence of malicious or “patently wicked interests.” See Feinberg, *Harm to Others*, p. 215.

⁸ *Ibid.*, p. 60.

⁹ Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (New York: Oxford, 1985), p. 57

¹⁰ Feinberg, *Harm to Others*, p. 63.

An act of poisoning the water supply invades a community interest and directly harms me; the bribing of a public official harms me only indirectly or remotely, but it *threatens* direct harm insofar as it endangers the operation of government systems in whose efficient functioning we all have a stake.¹¹

A welfare interest is *setback* when an individual, community, or government interest is placed in a worsened condition than it would have been before the act occurred. For example, A's wounding B with a knife results in A harming B, since A's attack is a:

- (1) wrongful (e.g., the violation of a person's right to bodily autonomy and physical well-being)
- (2) setback (e.g., the person's physical well-being is made worse than had the act not occurred)
- (3) of B's welfare interests (e.g., B's self-interest in his own well-being)
- (4) without defensibility (e.g., A did not instruct B to attack him or voluntarily consent to B's attack).

It is important to note that our ulterior or focal interests can only be protected by the criminal law to the extent that our welfare interests require protection; the criminal law cannot generally protect against infringements of focal aims to cure breast cancer, walk on the moon, or competing in the Olympics.¹²

Those actions which cause disliked experiences that do not necessarily harm us are distinguished from harms and divided into *hurts* and *offenses*. Feinberg differentiates hurts from harms by pointing out that hurts do not involve the violation or setback of *welfare* interests because there "is no interest in not being hurt as such, though certainly

¹¹ Ibid., 63

¹² Additionally, Feinberg discounts the possibility that harmfulness could include cases of purely moral harm. See Feinberg, *Harm to Others*, pp. 65 – 70.

we all want to escape being hurt, and the absence of pain is something on which we all place a considerable value.”¹³ Hurts can include such experiences as watching a very poor movie or hearing a low-volume of grating static from a neighbor’s outdoor radio. Hurts may rise to the level of harms if they are repeated or persistent enough; however, hurts *per se* cannot be criminalized under the harm principle due to the lack of setback to any welfare interest.

The other disliked, but not necessarily harmful, category is that of offenses. Feinberg’s elements of offense include the (1) wrongful (2) production of an unpleasant or uncomfortable, “universally disliked mental state” in a person (3) without defensibility or justification.¹⁴ This could include such examples as exhibitionism in the form of public nudity or public sexual intercourse or demeaning personal insults that cause offense.

Feinberg separates mere offenses from mere harms in several ways:

- Mere offenses are “harmless because they do not lead to any *further* harms besides interest in not being offended.”¹⁵
- “Offenses are a different sort of thing altogether [from harms], with a scale all their own” (that is, the scale of harm and the scale of offense are incommensurate with each other).¹⁶
- Offense is “surely a less serious thing than harm” (that is, the scale of harm is always much more serious conduct, and thus more broadly deserving of legal prohibition than the scale of offense).¹⁷

¹³ Ibid., p. 47.

¹⁴ Ibid., p. 49.

¹⁵ Feinberg, *Offense to Others*, p. 17.

¹⁶ Ibid., p. 3.

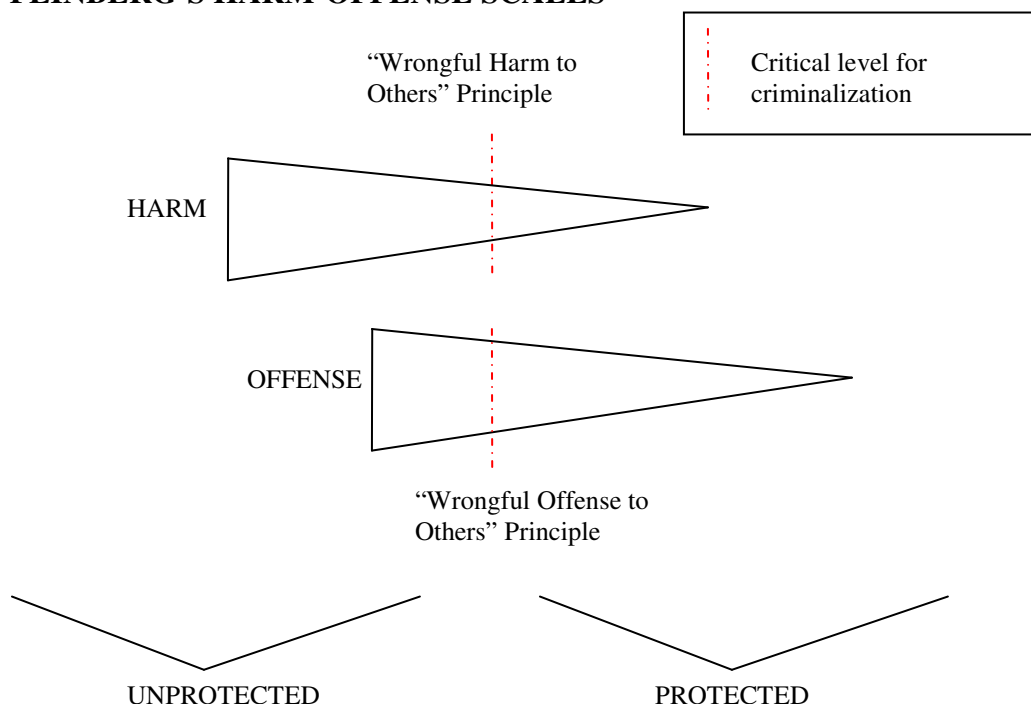
¹⁷ Ibid., p. 2.

The infamous problem for liberal theory that arises from restricting offensiveness is whether bare knowledge of those offenses is sufficient to justify their criminalization. According to Feinberg, the offense principle (and thus, the criminal law) can only apply to cases of personally affronting offenses. In other words, Feinberg distinguishes *profound offenses* from *mere nuisances* in that the former are non-experiential states of being offended produced by bare knowledge of such conduct and the latter are personally affronting experiences that result in offended states. For example, the profound offense that consenting adults are enjoying a raunchy orgy in the house three doors down from me does not fall under the jurisdiction of either the offense principle or the criminal law. My experience of people engaging in the same activity on a public street corner, however, can be legitimately prohibited as a mere nuisance under the offense principle. Bare knowledge of an act is not enough to qualify as an offense for purposes of criminalization; the narrow class of prohibited offenses must be of a personal nature.

The Feinbergian Harm-Offense Scales

Feinberg's incommensurate scales of harm and offense produce the following scales:

**FIGURE 1-A:
FEINBERG'S HARM-OFFENSE SCALES**



The Basics of Liberty-Limiting Principles

Feinberg's harm-to-others principle and offense-to-others principle share several characteristics of liberty-limiting (or coercion-legitimizing) principles generally. Liberty-limiting principles state that a "given type of consideration is always a relevant reason" in support of criminalization, even if there are other existing reasons that outweigh it. By no means are liberty-limiting principles themselves either sufficient or necessary conditions for legitimate criminalization. Liberty-limiting principles are not *sufficient* for limiting liberty because a supposedly relevant reason might not outweigh the "standing presumption in favor of liberty."¹⁸ Additionally, no liberty-limiting principle is sufficient for justifying legal coercion because, although a given law is legitimate, its

¹⁸ Feinberg, *Harm to Others*, p. 10.

implementation may be impractical or minimally effective. Nor are any of these principles *individually necessary* for legitimate criminalization, since a law may be justified by another liberty-limiting principle. Taken together, however, all of the liberty-limiting principles that are subscribed to by a given society are necessary for justifying legal coercion on liberty; that is, if legal coercion is not justified by any liberty-limiting principle, then the legal coercion is illegitimate.

The Harm Principle

Using his aforementioned definition of harm, Feinberg develops his harm principle to provide legitimate limits on individual liberty: that which causes wrongful harm to others is always a relevant reason for legitimate criminalization. The harm principle must have many secondary considerations (or mediating maxims) in order to make it a practically useful legislative tool. Although Feinberg lays out a number of mediating maxims to be considered in any case of harm, the most important include the following:

- *Volenti* maxim (“Volenti non fit injuria”): If John voluntarily consents to a harm or foreseeable risk of a harm by Freddy’s actions, then Freddy’s harmful action is not indefensible or unjustifiable (one of the requirements of a criminalizable harm). John’s “consent is a waiver of his right” not to be harmed.¹⁹
- *De minimis* maxim (“De minimis non curat lex”): If John’s harms by Freddy are “minor or trivial,” then they cannot be criminalized under the harm

¹⁹ Ibid., p. 215.

principle. State coercion of trivial acts will likely cause more harm than it prevents through direct infringement of John's interests, Freddy's interests, and those of third parties.

- Abnormal Susceptibilities maxim: John's abnormal vulnerabilities to certain kinds of harm cannot serve as a claim for protection by interfering with the "normally harmless activities of others people."²⁰ However, if John's vulnerability is easily identifiable (e.g., wheelchair paralysis), then the law may legitimately require others to avoid harming such people when it does not require serious inconvenience for others.
- Risk maxim: If Freddy's actions are not certain to result in harm, then risk of harm (consisting of the *gravity* and *probability* of the harm) must guide the criminalization of such actions, with *gravity* referring to the magnitude of harm and *probability* referring to the likelihood of its occurrence. The greater the risk of harm, the less reasonable it is to accept the risk (and thus the more legitimacy given to limitations on such conduct). For example, though Freddy's waving a gun in a seemingly deserted city street may not produce a great probability of harm, the gravity of such harm (e.g., fatality and severe injury to others) compensates for the lowered probability, and creates a high magnitude of risk that is unreasonable to accept.

²⁰ Ibid., p. 216.

The Offense Principle

The primary consideration for whether conduct counts as an offense is whether it is a wrongful production of an unpleasant or uncomfortable disliked mental state in a person without defensibility by another person, keeping in mind that offenses must be affronts against individuals (and not merely cases of bare knowledge). If conduct meets these criteria, then Feinberg's offense-to-others principle applies under a "balancing metaphor" of mediating maxims to determine whether legitimate state coercion of such conduct is justified. Feinberg lays out his offense principle as a modified version of tort law, weighing factors on the part of the offender and the offended. On the part of the offender, three maxims are considered:²¹

- Redeeming Social Value: The greater the importance of the offending conduct to both the individual offender's way of life and to society at large, the less legitimate the criminalization of such conduct.
- Alternate Opportunities: If it is possible that the offending conduct might have been performed at times or places causing less or no offense to others, without serious inconvenience to the offender, then criminalization becomes more legitimate.
- Motivation: The greater the extent to which the offensive conduct is motivated by spiteful or malicious intent, the more legitimate the criminalization of such conduct.

²¹ Feinberg, *Offense to Others*, p. 26.

The “reasonableness of the offending party’s conduct” is determined by:²²

- Extent: The greater the extent of the offense (determined by its intensity, duration, and scope of effect), the more legitimate the criminalization of such conduct.
- Reasonable Avoidability: The greater the ability of the offended party to reasonably avoid the offensive conduct in question, the less legitimate the criminalization of such conduct.
- *Volenti* maxim: If the offended party consents to the conduct (either directly or as part of foreseeable consequences), then reasons for legitimate criminalization will be weighed less heavily.
- Abnormal Sensibilities: If the offended states produced in a person are the result of abnormal sensibilities of the offended person, then reasons for the state coercion of the offense will be weighed less heavily.

To summarize, an offender’s conduct is legitimized to the extent that the offense is socially and personally important, necessary in its time and location, and unmotivated by spite. On the other hand, an offender’s conduct would be criminalized to the extent that the offense is intense, lengthy, affects a large number of people, is not easily avoidable or consented to, and not due to the abnormal sensibilities of the offended party.

To illustrate how these two sides are weighed, consider the following example of a completely-nude Mark masturbating on a bench in Central Park for a half-hour during lunchtime. Mark’s action is of minimal social importance, although it may be of moderate personal importance; it may certainly be relocated to the privacy of his home,

²² Ibid., p. 35.

where it causes less or no offense to others, without causing serious difficulty to Mark; Mark's masturbation is unmotivated by spite (as he, let's say, doing so purely for personal pleasure and not with the specific intent of offending anyone). Looking at the offended party, the intensity of the offense is moderate, its duration fairly lengthy (lasting about a half-hour), and affects a large number of angry New Yorker businessmen in nearby cafes. Mark's self-pleasure is not easily avoidable by other people on their way to and from work and lunch breaks, and certainly not the result of abnormal sensibilities of the offended party. In this example, the scale of legitimacy (accurately) weighs heavily in favor of the criminalization of Mark's masturbatory meal-time escapade.

Chapter 2: Revising Feinberg's Harm-Offense Model

Having given a general overview of Feinberg's model, chapters 2 and 3 focus on resolving two chief inconsistencies within the model. Addressing these two inconsistencies are of paramount importance in developing the "harmful offense to others" principle in Chapter 4 that will legitimately regulate whatever lies between the categories of harm and offense. This chapter will examine the relationship between harm and offense overlooked in Feinberg's distinctions and the current literature.

Feinberg's Relationship Between Harm and Offense

Despite his meticulous work, Feinberg's distinctions between harm and offense result in an inconsistency that must be resolved before continuing further in our analysis. Feinberg concludes that harms are wrongful setbacks to welfare interests generally and offenses are the wrongful productions of offended states in individuals. In order to compare harms and offenses, the following question must be answered: does this wrongful production of offended states in oneself regard a welfare interest, other interest, or a non-interest? Feinberg's account of harm and offense implicitly argues that the interest in not being offended *must* be a welfare interest, since the liberal state may legitimately criminalize infringements of welfare interests only and Feinberg's offense principle regulates a narrow class of offenses. That is, because Feinberg allows a narrow class of offenses to be legitimately criminalized and the only objects of legitimate criminalization must be infringements of welfare interests, his account of offenses must

involve infringements of *welfare* interests (as opposed to infringements of passing wants or focal aim).

But why should *we* accept offenses as infringements of welfare interests and not as violations of transient desires or infringements of our focal aims? Arguing that we wish to criminalize certain offensive actions, and that they must concern welfare interests, begs the question why offenses regard *welfare interests only* in the first place. Simply put, not being severely offended is central to maintaining mental security and autonomy, much as not being assaulted is central to maintaining bodily security and autonomy. It would be inaccurate to characterize an interest in “not being offended” as either a transient desire or focal aim. Transient desires represent those Feinbergian passing wants, such as the desire for Cici’s pizza, which fade or disappear as a result of being sufficiently met, enough time passing, etc. The interest in not being offended remains constant, whether time passes or the interest is met. Focal aims, on the other hand, represent those goals towards which we aspire, such as attending Yale or curing cancer; the interest in not being offended is a not an aspiration, but rather a stake on which we depend to maintain our minimal state of existence that is necessary to achieve those focal aims.

When these two distinctions of harm and offense *qua* welfare interests are juxtaposed, offenses become a definitional subset of the class of harms; that is, wrongful setbacks to the welfare interest in not being offended (offenses) are necessarily a subset of wrongful setbacks to welfare interests generally (harms). This conclusion – I’ll call it the “Subset Thesis” - is buttressed by Feinberg’s statement that offenses are “harmless

because they do not lead to any *further* harms, besides interest in not being offended.”²³

The inclusion of “*further* harms, besides interest in not being offended” strongly implies that offenses are narrowly harmful, and thus lends credence to the Subset Thesis of harms and offenses.

However, Feinberg’s apparent inconsistency comes when he states that “offenses are a different sort of thing altogether [from harms], with a scale all their own” (I’ll call this the Separation Thesis).²⁴ This statement supporting the Separation Thesis is directly opposed to the Subset Thesis of harms and offenses; if offenses are wholly contained as a narrow subset of harms, then they cannot be completely separate from harms “with a scale all their own,” and vice versa.²⁵ Feinberg’s distinctions in the above paragraph and his statement in this paragraph seem to endorse *both* the Subset Thesis and the Separation Thesis.

Problems arise if the Subset Thesis is correct. If offense simply involves a narrower infringement of one’s welfare interests than does harm, then the class of offenses is simply a subset of the class of harms. However, this is problematic. If offenses are necessarily and wholly contained within the class of harms (as Feinberg’s language suggests), then the offense principle becomes redundant and unnecessary.²⁶ The entirety of mere offenses (being wholly a subset of harms) would be regulated under the harm principle, nullifying the value of a now-redundant offense principle. Now falling under the harm principle, mere offenses *qua* harms would be regulated to the same degree and

²³ Feinberg, *Offense to Others*, p. 17.

²⁴ *Ibid.*, p. 3.

²⁵ *Ibid.*

²⁶ Indeed, there is a significant portion of literature by philosophers dedicated to arguing that Feinberg’s offense principle is tautological and excessive. See also A.P. Simester and Andrew von Hirsch, “Rethinking the Offense Principle,” *Legal Theory* 8 (2002): p. 269 – 295.

in the same manner as harms. This inclusion of mere offenses as a subset of harms results in any wrongful personal affront (in the form of an offense) being sufficient to justify limitations on liberty under the harm principle. In light of this analysis, consider Feinberg's following examples of offense:

- *Story 9: At some point during the trip the passenger at one's side quite openly and nonchalantly changes her sanitary napkin and drops the old one in the aisle.*²⁷
- *Story 11. A strapping youth enters the bus and takes a seat directly in your line of vision. He is wearing a T-shirt with a cartoon across his chest of Christ on the cross. Underneath the picture appear the words "Hang in there, baby!"*²⁸
- *Story 19: A youth (of either sex) is wearing a T-shirt with a lurid picture of a copulating couple across his or her chest, in which the couple depicted is recognizable (in terms of conventional representations) as Jesus and Mary.*²⁹
- *Story 31. A counter-demonstrator leaves a feminist rally to enter the bus. He carries a banner with an offensive caricature of a female and the message, in large red letters: "Keep the bitches barefoot and pregnant."*³⁰

If mere offenses were wholly contained as a subset of harms, then all of the above examples would result in legitimate coercion of individual liberty under the harm principle, *but for the wrong reasons*. Why does this occur? Under the harm principle, the primary requirement for criminalizing conduct is that it must create wrongful setbacks to

²⁷ Ibid., p. 11.

²⁸ Ibid.

²⁹ Ibid., p. 12.

³⁰ Ibid., p. 13.

others' welfare interests; since all such offenses create wrongful setbacks to others' welfare interests in not being offended, all of these offenses would be criminalized as causing wrongful harm to others. For example, story 31 would be criminalized to the same extent as story 9 *simply because* they are wrongful setbacks to persons' welfare interests in not being offended (by the harm principle), rather than in virtue of whether story 31 and story 9 have sufficient considerations of each act's nature to outweigh the presumption of liberty (as is the case under the offense principle). For instance, in story 9 the offense principle would likely be used to criminalize the woman's depositing of her sanitary napkin due to its unavoidability, lack of social value, etc., and other considerations of the nature of the act. In story 31, the offense principle would not criminalize the counter-protestor's message due to its social value, lack of alternate relocations, etc., and other considerations of the act. Under the Subset Thesis, offensiveness as a subset of harmfulness causes offenses to be criminalized to a similar degree and for the same reasons as harms. The Subset Thesis seems an unlikely view for Feinberg because this consequence is exactly what Feinberg is attempting to avoid – the criminalization of a large class of offenses merely because of their offensive nature instead of being due to considerations of the nature of the offender and the offended.

What if the Separation Thesis *is* Feinberg's position – if offenses and harms are distinct and separate categories? The next section will show why harm and offense are not wholly distinct, and that there are actions which may fall between the classes of harm and offense. Indeed, the proposed understanding of Feinberg's account of harm and offense does not fit under either the Subset Thesis or the Separation Thesis, but rather somewhere in between.

The Proposed Relationship Between Harm and Offense

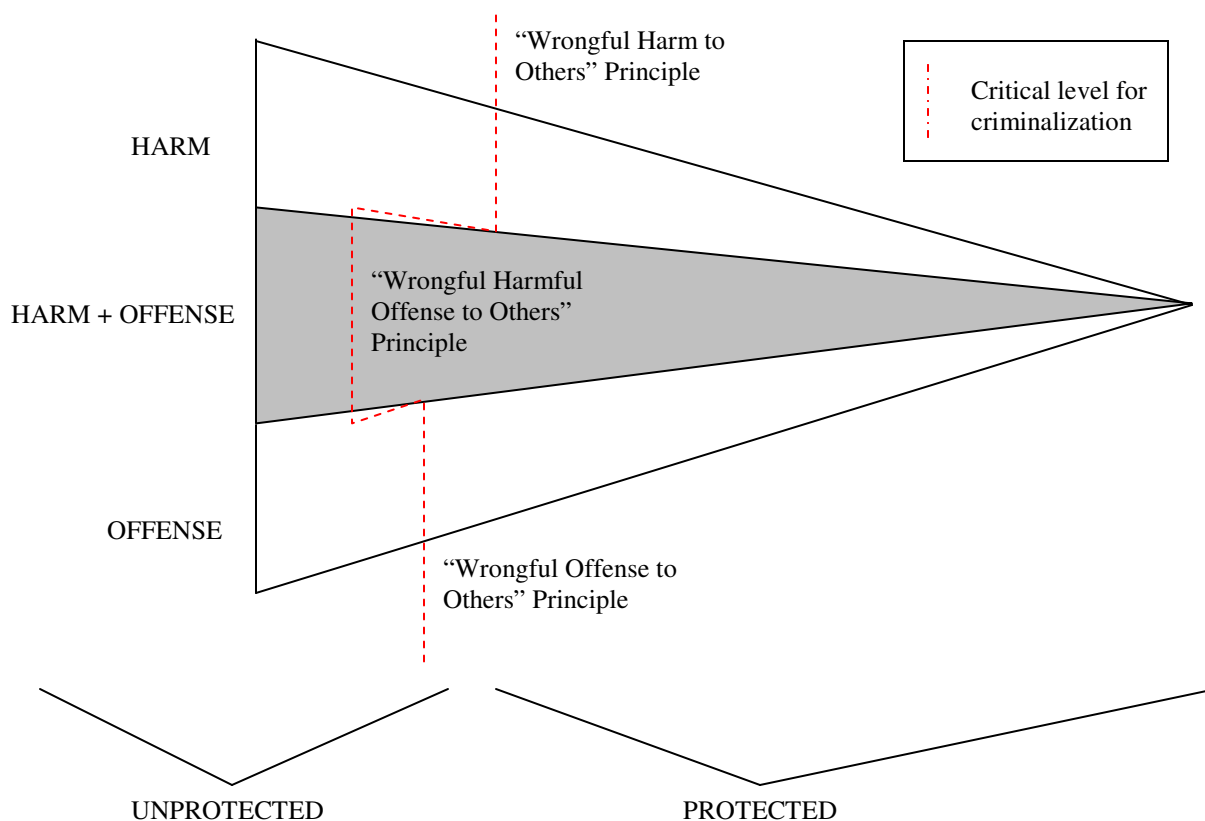
David Shoemaker points out that “there remains a great deal of unresolved confusion in the literature over the extension of both ‘offensiveness’ and ‘harmfulness’.”³¹ By analyzing the definitional boundaries of the two concepts, the relationship between harm and offense can be expounded in further detail. For Feinberg, harm is a wrongful setback to welfare interests generally and offense is a wrongful setback to the particular welfare interest in not being offended.

With this analysis, the realms of harm and offense are not “wholly distinct,” but rather, both lie on the same spectrum of *wrongful setback to welfare interests*. Thus, Feinberg is mistaken (according to the position that he has expounded) when he states that “offenses are a different sort of thing altogether [from harms], with a scale all their own.”³² Harm and offense differ from each other merely in what *kind* and what *degree* of welfare interest is setback. Consider the proposed spectrum:

³¹ Shoemaker, ““Dirty Words and the Offense Principle,” p. 545.

³² Feinberg, *Offense to Others*, p. 3.

**FIGURE 2-A:
PROPOSED HARM-OFFENSE SPECTRUM**



Rather than separate harm and offense scales, the relationship between harm and offense is better described by their conjoined presence on the broader scale of wrongful setbacks to welfare interests. Harm and offense, in turn, are merely two manifestations of wrongful setbacks to welfare interests. Pure (or mere) offensiveness is the wrongful setback of the welfare interest in not having those offended states produced in oneself; pure (or mere) harmfulness is the wrongful setback of a welfare interest *other than in not having offended states produced*. This is where the proposed model diverges from Feinberg's. By specifically excluding the interest in not having offended states produced from the realm of harmfulness, offensiveness no longer becomes a subset of harmfulness (thus

avoiding the problems with the Subset Thesis stated earlier). Additionally, the Separation Thesis is also nullified, such that offensiveness and harmfulness may (and do) still overlap in the area of harmful offense, i.e., those actions which are neither criminalized under the harm or offense principles, but which should be criminalized (per our considered judgments) in a liberal society.

Why is there any good reason for separating welfare interests generally from the welfare interest in not being offended? I will discuss this distinction in detail towards the end of this chapter, but the basic reason concerns differences in the *kind* of welfare interest each involves.³³ Welfare interests generally – for example, a minimum level of physical and mental health, security over one’s own private property, etc. – are defined by their non-normative nature. However, the welfare interest in not being offended is marked by its largely normative definition. Although both are different kinds of related welfare interests, the difference in their normative natures require different treatment to distinguish them precisely.³⁴

The Nature of Harmful Offenses

Harmful offenses must intertwine elements of pure harms and pure offenses, such that harmful offenses are:

- (1) acts or omissions of an act
- (2) that are wrongful
- (3) setbacks of

³³ See page 24 under “Normative and Non-Normative Components.”

³⁴ Indeed, Feinberg provides plausible arguments for maintaining an offense principle separate from the harm principle (rather than handling offenses under the harm principle), but such a discussion is beyond the scope of this thesis.

(4) *two* kinds of welfare interests:

(G) the general welfare interests (element of harmfulness, e.g., bodily autonomy, security of self, etc.), and

(O) the specific welfare interest in not being offended (element of offensiveness)

(5) without moral defensibility or excuse.

What kind of actions would constitute harmful offense, but would fall under neither pure harms nor pure offenses? Here I enlist a parallel to Feinberg's 31 stories of a *ride on a bus* stories. In each of the following scenarios, the reader should imagine herself on her way to work or some other appointment through a large city park; in each case, finding another route would greatly inconvenience the reader or such a route is not easily available (lack of a vehicle, scheduling of the city light rail, etc.).

- *Scenario 1*: A group of mourners carrying a coffin sit in the park along your direct route. Their demeanor, however, is "by no means funereal. In fact they seem more angry than sorrowful, and refer to the deceased as 'the old bastard,' and 'the bloody corpse.' At one point they rip open the coffin with hammers and proceed to smash the corpse's face with a series of hard hammer blows."³⁵
- *Scenario 2*: Each day, a stationery person of the opposite sex yells vulgar and implicitly threatening comments at the reader that would fall under sexual harassment, e.g., "I should come and show you a good time" or "That miniskirt is asking for some lovin'."

³⁵ This is borrowed from Feinberg's *Story 10*, which I believe is more accurately characterized as a harmful offense rather than a mere offense. Feinberg, *Offense to Others*, p. 11.

- *Scenario 3:* Same as above, except the stationery person is of the same sex as the reader.
- *Scenario 4:* Same as *Scenario 2*, except the person of the opposite sex follows you to your place of employment (rather than remaining stationery) while continuing their verbal tirade.
- *Scenario 5:* Same as above, except the person is of the same sex as the reader.
- *Scenario 6:* Each day, a person (male or female) waits with a rose, coffee, or some other gift, directing comments at the reader such as “This is for you, my love” “Why do you keep refusing me?” and becoming verbally hostile in tone (without any direct threats).
- *Scenario 7:* Each day, a person (male or female) waits with a dead flower, rat corpse, or other “gift,” directing similar comments in a similarly hostile tone without any direct threats.
- *Scenario 8:* While walking through the park, the reader accidentally bumps into a jogger running in the opposite direction, and the jogger responds with expletives and comments such as “Watch where you’re going, you might get hurt” or “Get out of the way – I wouldn’t want anything to happen to you,” and continues jogging in the opposite direction.
- *Scenario 9:* Same as above, except the jogger (instead of continuing in the opposite direction) turns and follows you, making the same sort of comments.
- *Scenario 10:* An unidentified man hands out flyers in the park. The flyers contain pictures that are graphic in nature, showing exposed genitalia and sexual intercourse quite vividly. There is no mention of the displayed persons

ages or consent; however, the persons depicted in the flyers reasonably strike the reader as minors.

- *Scenario 11*: Same as *Scenario 10*, but instead of an unidentified man, it appears to be a representative from a theater, wearing an identification badge and collared shirt displaying the name of the theater.
- *Scenario 12*: Still more flyers – the same as either *Scenario 10 or 11*, but the flyers explicitly advertise minors in the obscene depictions.
- *Scenario 13*: Same as above, except there is a disclaimer at the bottom which states that the obscene depictions are not of actual minors, but instead of youthful-looking adults.

This discussion of harmful offenses is not to serve as an all-inclusive introduction to the proposed concept itself, but rather a taste of the entire “harmful offense to others” principle presented in Chapter 4. Each of the above scenarios depicts a situation of harmful offense that may not be criminalizable under Feinberg’s harm or offense principles; however, as readers, we generally accept *some* of these scenarios as legitimately criminalizable. These scenarios also exhibit varying ratios of setbacks to the two types of welfare interests required for a harmful offense. For example, Scenarios 4 and 5 seem to constitute greater harm than Scenarios 2 and 3, whereas Scenario 12 seems to constitute greater offense than Scenario 8.

It may be useful to examine some of these scenarios in detail in order to understand how they constitute harmful offenses. Feinberg categorizes Scenario 1 as one of his stories of offense from his famous “ride on the bus.”³⁶ However, a situation where

³⁶ Ibid., p. 10.

a corpse is subjected to a “series of hard hammer blows” is a situation of harmful offense, not of ‘pure’ Feinbergian offense. In light of Feinberg’s discussion on the plausibility of interests surviving post-mortem, the corpse-bashing not only offends the bus passengers, but also harms the deceased person by wrongfully setting back his surviving interest in maintaining bodily security.³⁷

Even though some of these scenarios (and other unlisted ones) may not clearly pass the harm or offense tests, our considered judgments may clearly convince us that some of these actions should be within the legitimacy of the criminal law. In order to extend the boundaries of the criminal law’s legitimacy, there must be a paramount, underlying rationale that would permit us to lower the threshold for legitimate criminalization in the case of harmful-offense. After all, there is the liberal presumption in favor of liberty that must be outweighed in order to criminalize acts legitimately. The question then becomes: what is specific to the nature of harmful offenses (which is not part of the nature of either pure harms or pure offenses) that overrides the weight of liberty on the other side of the scale?

There are two basic observations about the nature of harmful offenses that distinguish them from pure harms and pure offenses. The first observation involves an issue of privacy. In general, it is evident beyond elaboration that individuals in a liberal

³⁷ It is arguable whether “bodily security” is a surviving post-mortem interest; for example, it could be argued that an interest in bodily security dies with the person and that it is not the person’s interest in his own bodily security, but *our* (i.e. his loved ones, the public, etc) interest in *his* bodily security. However, I believe the best case for bodily security as a surviving post-mortem interest stems from our criminalization of grave robbers and unwarranted exhumation of a corpse. The deceased person may not have any loved ones to maintain a stake in his corpse’s bodily security, although it could be argued that bodily security of corpses may be a public interest. Even if we reject a public interest in such post-mortem security of corpses, I believe it is neither unreasonable nor inconsistent to state that the deceased person has a surviving interest in his post-mortem bodily security. Such a deceased person’s interest is, at least in part, the rationale behind the creation of wills to dictate one’s bodily disposition (e.g. funeral, cremation, spreading of ashes, etc.) post-mortem.

state have a stake in basic privacy; broadly, privacy is construed as a welfare interest in excluding others from one's personal domains (e.g., body, home). In a reversed sense, privacy also involves a welfare interest in not being involuntarily included in the personal domains of others. So, in addition to a harmful setback of an individual's welfare interests generally (possibly resulting in lost opportunities), harmful offenses *compound* the setback to welfare interests through a *reverse-privacy violation*. (A specific example of how harmful offenses can constitute a reverse-privacy violation will be discussed in chapter 7).

Normative and Non-Normative Components

The second observation about the nature of harms, offenses, and any middle ground involves the normative status of its components. It may be said that harms and offenses are constituted by differing combinations of two central, distinct components: *normative* and *non-normative*. The *normative* component refers to the sense in which the act is a wrong (e.g., violation of someone's rights). The *non-normative* component refers to the sense in which the act is a setback to the welfare interests of the affected party. As Robert Amdur points out in "Harm, Offense, and the Limits of Liberty," "the harm principle combines the key elements of both senses: to harm another person we must set back, thwart, or defeat his interests in a way that violates his right."³⁸

As part of the investigation into the relationship between harm and offense, it is useful to extend Amdur's analysis of harm to the concepts of offense and harmful offense. As I have previously argued, offenses *do* involve the setback of a welfare interest

³⁸ Robert Amdur, "Harm, Offense, and the Limits of Liberty," *Harvard Law Review* 98, no. 2 (1985): p. 1497.

– the welfare interest in not being offended. In this sense, there is some strictly-semantic idea of a non-normative component. However, I would argue that offenses do not truly have such a non-normative component due to the nature of the welfare interest that they concern. The very nature of the welfare interest in not being offended is normative; it is defined by current and historical social conventions, the “felt necessities of the time, the prevalent moral and political theories,” and experience.³⁹ Ultimately, due to the very circumstantial nature of the welfare interest of which offense is concerned, offense does not have a wholly non-normative component.

Harmful offense, on the other hand, is amenable to a much more straightforward analysis. Since harmful offense includes acts that have a setback to welfare interests generally as well as a setback to the welfare interest in not being offended, harmful offense does have a truly non-normative component (i.e., the harm that the act produces). Harmful offense differs from pure offense in this key way; however, harmful offense’s components also differ from those of pure harm. Pure harm is composed of two equally-weighted normative and non-normative components. Harmful offense – by contrast – while still containing a non-normative element – has a much larger normative component proportionate to its non-normative one. Harmful offense requires a similar seriousness of setbacks to welfare interests generally (non-normative) and setbacks to the welfare interest in not being offended (normative) as well as presupposing a wrong *qua* a violation of rights (normative).

This seems to make sense intuitively. Harmful offense includes examples of sexual harassment, stalking, offensive public displays where there is also a setback to

³⁹ Oliver Wendall Holmes Jr., *The Common Law* (Boston: Little, Brown and Co., 1881), pp. 1-2.

other welfare interests, and (as we shall see) some publicly-marketed, technologically-advanced cases of animated child pornography. These examples involve a basic measure of non-normatively defined setbacks to welfare interests, but also rely heavily on the normatively-defined (1) system of legal rights and (2) the interest in not being offended.

Revisiting Simester and von Hirsch's Distinctions

In the introduction, I referred to Simester and von Hirsch's distinctions between the effects of pure harms and pure offenses:

...[H]arm involves the impairment of a person's opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen goals. In this sense, harm is *prospective* rather than backward-looking; it involves a diminution of one's opportunities to enjoy or pursue a good life.

By contrast, at least paradigmatically, offensive behavior does not reduce a person's opportunities or frustrate his goals. Rather, it causes the victim distress without adversely affecting the sorts of interests that are the concern of the Harm Principle. ... In this sense, offense is *experiential* rather than forward-looking: the affront suffered by V need not, though it may, suffer the cessation of the offensive conduct. Hence offended states are not in themselves a harm, since they do not necessarily imply any prospective loss of opportunity on the part of the victim. ... They do not, in other words, set back our interests.⁴⁰

Simester and von Hirsch's distinctions seem to conflict with the relationship between harm and offense as I have expounded it. They go on to argue that offenses cannot be prospective in the sense that they cannot set back any welfare interest; there exists no such welfare interest in not being offended because it is not an outcome in which someone has a stake and involves no "invest[ment of] some of one's own good in it, thus assuming the risk of personal harm or setback." In a similar fashion, they imply that, unlike offenses, harms cannot be experiential because they do not "come to us, are

⁴⁰ Simester and von Hirsch, "Rethinking the Offense Principle," p. 281; emphasis added

suffered for a time, and then go, leaving us as whole and undamaged as we were before” (as offenses do).⁴¹

It is important to tread carefully here. Simester and von Hirsch’s distinctions (experiential vs. prospective), while useful for analyzing the general effects of harms and offenses, are predicated on a false assumption about the nature of setbacks to welfare interests. Simester and von Hirsch define a setback as the “diminution of one’s opportunities to enjoy or pursue a good life.”⁴² However, this definition of a setback is too narrow. Consider Feinberg’s example of a mere trespasser:

A trespasser invades the landowner’s interest in “the exclusive enjoyment and possession of his land.” Technically that interest is violated when the trespasser takes one quiet and unobserved step on the other’s land; in the somewhat special sense of harm we have been developing, such a violation sets back an interest, and to that extent therefore harms the interest’s owner, even though it does not harm any other interest, and may even be beneficial on balance.⁴³

Using Simester’s and von Hirsch’s definition of a setback, the mere trespasser’s unobserved steps onto the landowner’s property has not diminished his opportunities “to enjoy or pursue a good life” in any way.⁴⁴ Thus, the “mere trespasser” wrongs the landowner, but does not setback any of his interests (and so the act is not a harm which can be addressed by the criminal law). However, this seems too reliant on the foreseeable negative consequences to one’s opportunities for prosperity; there are many scenarios where the violation may not produce a negative consequence upon one’s opportunities, but nonetheless still stands as a legitimate harm.⁴⁵ Additionally, Simester and von

⁴¹ Ibid.

⁴² Ibid.

⁴³ Feinberg, *Harm to Others*, p. 107.

⁴⁴ Simester and von Hirsch, “Rethinking the Offense Principle,” p. 281.

⁴⁵ Simester and von Hirsch actually do reject that such a mere trespass is generally a harm which may be addressed by the criminal law under the Harm Principle, but allow that there *may* be some cases where such mere trespasses do rise to the level of harm necessary to invoke the criminal law.

Hirsch's use of setback implies that the landowner would not be harmed until he had knowledge of the trespass, as his opportunities for enjoying life would not diminish until he was aware of the trespass. As I have shown earlier in chapter 1, harms do not require an awareness by the affected party, whereas offenses do.

Chapter 3: Considerations of Reasonableness

The first inconsistency we explored – Feinberg’s false dilemma of harm and offense – will be used in chapter 4 to develop a new principle for regulating harmful offenses. First, however, I turn to the second inconsistency within Feinberg’s model – his offense principle – which revolves around a failure to consider the reasonableness of the offender’s actions. He has neither “required that offenses be taken reasonably in order to qualify for legal intervention” nor included the “degree of reasonableness of an offense among the determinants of its seriousness.”⁴⁶ Additionally, Feinberg only considers the reasonableness of the offended party’s reaction through the four corresponding mediating maxims, but does not do so for the offender’s actions. This chapter will explain why a test of reasonableness is necessary for Feinberg’s offense principle and show how that test can be woven into a liberty-limiting principle, starting with David Shoemaker’s conception of reasonableness.

Reasonableness vs. Rationality

It is imperative that the terms “rationality” and “reasonableness” are accurately defined. As Richard Arneson describes it in “Mill versus Paternalism,” rationality is an “economic value”; it is a value that we impose on our decisions in order to promote our own welfare interests.⁴⁷ Rationality may be of two types. A person can be said to be *competently* (ir)rational if he is (*un*)able to make decisions that promote his own welfare interests (e.g., competent irrationality could be the result of a flaw in the design of his faculties). On the other hand, a *prudentially* (ir)rational person has the ability to make

⁴⁶ Feinberg, *Offense to Others*, p. 28.

⁴⁷ Richard J. Arneson, “Mill versus Paternalism,” *Ethics* 90, no. 4 (1980), pp. 478.

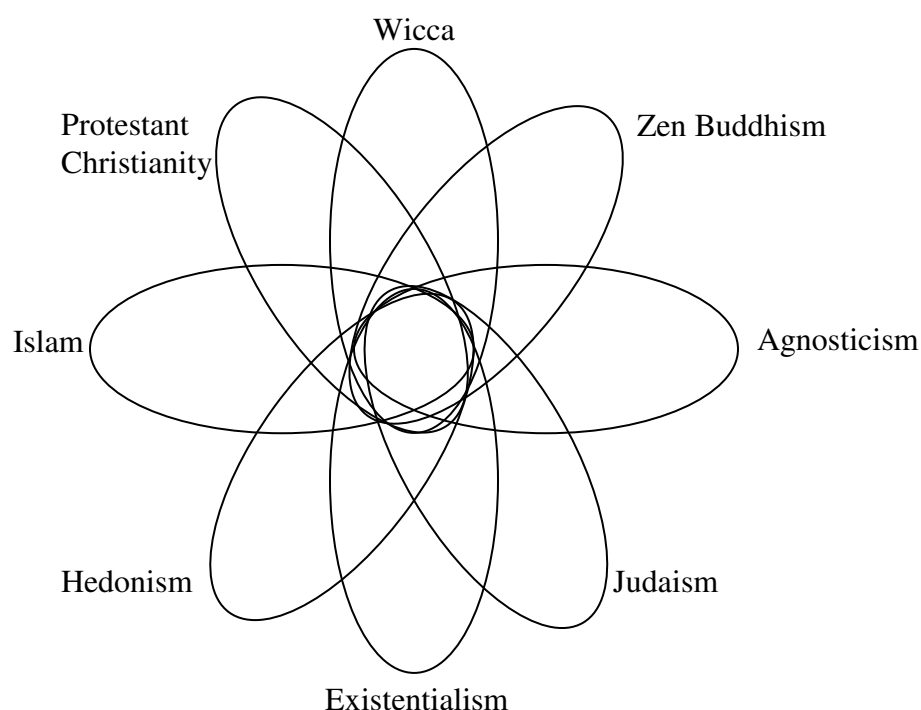
decisions that promote his own welfare interests, but *chooses* otherwise (perhaps because his decisions are primarily based on the economic value of happiness, and the achievement of his own welfare interests are of little concern). Prudential rationality, as I have distinguished it here – is akin to prudential justification in epistemology, where subject S is prudentially justified if it is in S's best interests to believe P. Simply put, a prudentially irrational person voluntarily makes decisions that are not in his best interests.

Reasonableness, on the other hand, is not an economic value, but rather a measure of consistency, coherence, and stability of a person's belief-system and any arguments stemming from it. Reasonableness is also of two types: private (internal) and public (external). Privately (un)reasonableness refers to (in)consistency within an individual's belief-system; for example, a person is privately unreasonable if they endorse both "A" and "not-A." Public (un)reasonableness refers to (in)consistency between an individual's belief-system and the foundational social values that cannot be erased without tearing the fabric of society itself (e.g., in the United States, basic equality and liberty). If a person makes arguments for state legislation based on a belief-system that is not consistent with that individual's own freedom and equality (e.g., everyone should be his slave), then that person's set of beliefs is publicly unreasonable. Although rationality is a related topic, Feinberg's inconsistency results from his failure to use public reasonableness as a criterion for arguments regarding state coercion. Reasonableness will be the subject of this chapter.

Public Reasonableness as an Extension of Rawls

The above definition of public reasonableness is not yet specific enough to develop a criterion for the offense principle, or to show even why one is necessary. The concept of reasonableness must be placed within the context of a liberal society in order for its relevance to be of any merit. Such a liberal society is most expansively defined by John Rawls, whose “well-ordered liberal society” is constructed of numerous, overlapping conceptions of the good (Rawls’ “comprehensive doctrines”).⁴⁸ For example:

**FIGURE 3-A:
RAWLSIAN LIBERAL SOCIETY⁴⁹**



Within this hypothetical overlapping consensus lies Rawlsian public reason – “the reason of equal citizens who, as a collective body, exercise final political and coercive

⁴⁸ John Rawls, *Political Liberalism*, (New York: Columbia University, 1993), p. 214.

⁴⁹ I am grateful to Alan Fuchs for illustrating the “flower model” of Rawlsian liberalism.

power over one another in enacting laws and in amending their constitution.”⁵⁰ Public reason is the liberal society’s requirement that citizens be able to “explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.”⁵¹

The liberal society is one that values the guarantee of individual liberty and equal opportunity to pursue any “permissible” comprehensive doctrine.⁵² It is important to note that there are limits to which comprehensive doctrines an individual may permissibly pursue in the liberal state, and those arguments that citizens make “to pursue ends that transgress [these] limits have no weight.”⁵³ These limits are imposed by the values of individual liberty and equal opportunity themselves because they form the foundation of the liberal state; any arguments stemming from comprehensive doctrines have no merit if they try to justify legislation that is inconsistent with the liberal state’s basic emphasis on individual liberty and equal opportunity. For example, consider the Slavist (a hypothetical diehard supporter of slavery) who adheres to a comprehensive doctrine that argues for legislation enslaving men to women from birth to death. Since the Slavist’s arguments and comprehensive doctrine are inconsistent with the liberal state’s values of equal opportunity and equal liberty, the Slavist’s comprehensive doctrine is excluded from the Rawlsian well-ordered society in the above figure.

As an extension of Rawlsian public reason, a comprehensive doctrine is publicly unreasonable if:

⁵⁰ Rawls, *Political Liberalism*, p. 214.

⁵¹ Ibid.

⁵² Shoemaker, “‘Dirty Words’ and the Offense Principle,” p. 571.

⁵³ Rawls, *Political Liberalism*, p. 449.

...adherence to the doctrine requires one to be unwilling to propose and/or abide by fair terms of cooperation with others from outside the doctrine, and then consensus cannot be reached...or sustained.⁵⁴

In staying aligned with the idea of public reason, Shoemaker claims that reasonable public justification for legitimate state coercion of liberty must:

- (1) adhere to basic standards of “ways of reasoning in general,” which includes inference to the best explanation, deductive principles of logic, logical validity and soundness, rules of evidence, and so forth; and,
- (2) be restricted to the “types of reasons that can be argued.” Reasonable justification for legitimate state limitations on liberty cannot appeal exclusively to an individual’s private comprehensive doctrine (e.g., Buddhism). Otherwise, such justification does not meet the demand of public reason that justification be endorsed by others as “consistent with their own freedom and equality,” and is thus publicly unreasonable.⁵⁵

Feinberg’s Rejection of Reasonableness

Feinberg explicitly states that his offense principle neither requires that “offenses be taken reasonably in order to qualify for legal intervention” nor include the “degree of reasonableness of an offense.”⁵⁶ His offense principle rejects a public reasonableness requirement for two reasons. First, he states that the requirement is “redundant and unnecessary, given our endorsement of the extent of offense standard.”⁵⁷ Since Feinberg’s balancing scales of maxims tend to prohibit only very widespread offenses, it would be very unlikely that actions causing *only* unreasonable offense will be prohibited.

⁵⁴ Shoemaker, “‘Dirty Words’ and the Offense Principle,” p. 557.

⁵⁵ Rawls, *Political Liberalism*, p. 214.

⁵⁶ Feinberg, *Offense to Others*, pp. 35 – 36. This rejection of a reasonableness threshold for the nature of offenses seems to be at odds with Feinberg’s earlier, specific intent to determine the “reasonableness of the offending party’s conduct” through the respective four mediating maxims regarding reasonable avoidability, *Volenti*, etc. Following the principle of charity is essential here, especially given Feinberg’s meticulousness. I believe Feinberg is using two different meanings of “reasonableness”; he rejects reasonableness *qua* the Rawlsian notion of public reason by rejecting a reasonableness requirement for offenses, but he seeks reasonableness *qua* abstract, non-philosophical reasonableness. Even so, the proposed reasonableness requirement in this chapter will repair both the lack of Rawlsian reasonableness regarding offenses and the partial consideration of reasonableness of the offended (but not offending) party.

⁵⁷ *Ibid.*

It is highly unlikely that something could become offensive to a widespread number of people with “unreasonable dispositions.”⁵⁸ Second, Feinberg’s account excludes consideration of the reasonableness of the offensive action because such a consideration would:

... require agencies of the state to make official judgments of the reasonableness and unreasonableness of emotional states and sensibilities, in effect losing these questions to dissent and putting the stamp of state approval on answers to questions which, like issues of ideology and belief, should be left open to unimpeded discussion and practice.⁵⁹

Feinberg is wary of a reasonableness condition that would grant the state authority to pass judgments on offended party’s reactions and individuals’ comprehensive doctrines, which would illiberally undermine the doctrine-neutral, liberal state.

Why Reasonableness Is Necessary

As Shoemaker points out, Feinberg fails to distinguish among different referents of reasonableness in his rejection of such a condition. There are at least four different targets of reasonableness:

- R1. the individual’s offended reaction itself
- R2. the offended party’s reasons for “adhering to the general worldview that underlies and gives rise to the offended reaction”
- R3. the worldview itself
- R4. the offended party’s justification(s) for legislation against the offending action⁶⁰

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Shoemaker, “‘Dirty Words’ and the Offense Principle,” p. 555. While other referents of reasonableness may exist, only R1 through R4 are necessary for the scope of the discussion here.

Consider staunch vegan Velma who lives adjacent to carnivorous Carl, who loves to hold weekly barbeques in his backyard. Velma is very offended by the wafting smell and sight of roasting chitterlings, whole chickens, and basted ribs, and so asks the local government to ban outdoor barbeques from the city. How would the four referents of reasonableness apply in the above example?

- R1. Is it reasonable for Velma to be offended by Carl's barbeques (given the vegan worldview to which she adheres?)
- R2. Is it reasonable for Velma to accept the vegan beliefs that underlie her offended reaction? (i.e., Do Velma's reasons for believing in a vegan worldview withstand scrutiny?)
- R3. Is veganism a reasonable framework? (i.e., Is it a logically consistent view of the world?)
- R4. Are Velma's justification and arguments for state coercion against Carl reasonable? (i.e., Do they meet the demands of Rawlsian public reason, as outlined previously?)

Feinberg rightly rejects reasonableness in order to avoid the state's stamp on individual ideologies, and in doing so validly argues against reasonableness considerations of R1 and R2. A liberal state should not endorse or interfere with its citizens' liberties to hold any chosen framework of the world, making it illiberal for the state to judge the appropriateness of offended reactions that stem from those private worldviews. However, this leaves the question of R3 and R4. Shoemaker argues that both R3 and R4 are necessary thresholds for an offense principle in a liberal society. He goes on to explain that R3 requires that the offended party's worldview (from which the offended reaction(s)

stem) is “internally consistent, coherent, and stable.” R4 requires that justification for legitimate state coercion of liberty meet the demands of public reason.

Feinberg secondly rejects reasonableness on the grounds that widespread offenses that would tend to be prohibited by the offense principle would have to involve nearly all members of the offended party having an “unreasonable disposition.”⁶¹ Feinberg concludes that the “very unreasonableness of the reaction will tend to keep it from being sufficiently widespread to warrant preventive coercion.” However, history shows us otherwise. Consider periods of widespread offenses that resulted in state coercion where virtually all of the offended party had an unreasonable disposition –for example, interracial interactions between blacks and whites, Japanese internment camps, public expression between gay couples, sodomy laws, and Jews speaking to Germans. These are all cases of offensiveness that became widespread *despite* the apparent unreasonableness of the offended reaction, weakening Feinberg’s conclusion. Simester and von Hirsch even point out that:

On [Feinberg’s] view, the “reasonable avoidability” of the conduct weighs against criminalization. Hence it ordinarily militates against criminalizing purportedly offensive behavior conducted in private. But it is no absolute bar to criminalizing such conduct; if sufficient numbers were upset by “the very thought” of the behavior occurring behind closed doors, Feinberg admits, it could be prohibited.⁶²

Additionally, Feinberg’s dependence on an unreasonable disposition only considers reasonableness *vis-à-vis* R1, and ignores the other possibilities (R2, R3, R4) to which reasonableness may refer.

Thus far our discussion has shown that reasonableness should not be rejected, but why must it be included as another test in the offense principle? Consider how Feinberg’s

⁶¹ Feinberg, *Offense to Others*, p. 36.

⁶² Simester and von Hirsch, “Rethinking the Offense Principle,” p. 280.

offense principle – without a reasonableness condition - would legitimately prohibit an interracial couple from eating lunch together in a town of bigots, who are offended solely due to their racist beliefs (e.g., that races should not mix, etc.). The couple is sitting on a bench in the middle of a large public park surrounded by these bigots' office buildings.

Considerations on the side of the offending party include:

- A1. Redeeming Social Value: The importance of the couple's eating lunch together is of moderate importance to the couple, and minimally important to the society at-large.
- A2. Alternative Opportunities: This couple could easily eat at a place and time causing less (or no) offense to others (e.g., the privacy of a home, etc.)
- A3. Motivation: The couple's lunch is not a spitefully-motivated action intended to irritate others.

Considerations on the side of the offended party (the bigoted citizens walking through the park) include:

- B1. Extent of Offense: The offense is widespread (given the couple's location) and moderately intense.
- B2. Reasonable Avoidability: It would inconvenience the townspeople in their window offices to avoid this sight.⁶³
- B3. Foreseeable Risks: Going to one's office and looking out the window can hardly include the risk of seeing something that one might find offensive.
- B4. Abnormal Sensibilities: The townspeople's offended states are not due to any

⁶³ It could be argued that the townspeople could simply avert their eyes from this offensive sight; such a solution, however, would *always* result in an offense being reasonably avoidable, as all offended parties could just avert their gaze from the offending party's conduct. This places *too* much of a burden on those who would be offended, requiring something of a Nietzschean "super will" to overcome a normal human psychological disposition to simply forget any given offense.

abnormal *physical* sensibilities.

With the heavy weight now leaning against the offending party, Feinberg's offense principle seems to justify the criminalization of the couple's lunch. Fringe cases (like this one) that serve as counterexamples to Feinberg's offense principle follow a similar logic, and point to the need for a reasonableness condition to prevent the illegitimate criminalization of widespread offenses.

Formulating a Reasonableness Condition (RC)

In formulating a reasonableness requirement, or Reasonableness Condition (RC), we must first decide what referents of reasonableness should be included. R1 and R2, as shown earlier, should not be included due to their illiberal consequences of the state's endorsement of particular comprehensive doctrines. R3 – the internal consistency, stability, and coherency of a comprehensive doctrine – and R4 – justification adhering to the demands of public reason – are the other two possibilities. Shoemaker argues that both R3 and R4 should serve as components of a Reasonableness Condition (RC). He states that considerations of R3 should be used by the state to legitimately “ignore the complaints of adherents based on tenets of *comprehensive doctrines* that are internally inconsistent, incoherent, or unstable.”⁶⁴ This seems illiberal – a comprehensive doctrine that has the characteristics of internal inconsistency or instability could be the result of either a privately unreasonable or irrational lifestyle. A liberal state should not impose the value of rationality on individuals' comprehensive doctrines; doing so illiberally endorses a particular *type* of comprehensive doctrine to begin with. People in a liberal society

⁶⁴ Shoemaker, “‘Dirty Words’ and the Offense Principle,” p. 558.

should have the liberty to hold rational or irrational belief systems. Richard Arneson states that rationality itself is an economic value and that liberal states should “be prepared to tolerate deviations from rationality that occur through a person’s exercise of autonomous choice.”⁶⁵ The assumption that each individual desires to rationally maximize his own ends illiberally imposes that economic value of rationality on their lives.

That leaves us with considerations of R4 – mandating that the justification for legitimate criminalization must be reasonable by meeting the demands of public reason. Reasonableness with respect to public argumentation is a valid liberal requirement; without this consensus, public discussion and justifications for the criminal law would become aimless and incoherent, as there would be few (if any) criteria and rules of discussion.⁶⁶ Using R4 and the idea of public reason, the Reasonableness Condition can be formulated as follows:

RC: When one offers justification for state coercion of offenses, the justification must be reasonable; that is, it must meet the demands of Rawlsian public reasons. Public justifications should be considered weightless if:

- (a) they originate solely in private comprehensive doctrines that could not be endorsed by all other reasonable citizens *consistent with their own freedom and equality*; or
- (b) they do not follow basic logical rules for argumentation, i.e., rules of evidence, principles of inferences and intuition, the law of non-contradiction, self-identity, transitivity, and other basic, agreed-upon ways of reasoning.⁶⁷

Using the RC as primary test for the offense principle corrects the problem we find with the earlier counterexample to Feinberg’s model of an interracial couple having lunch.

⁶⁵ Arneson, “Mill versus Paternalism,” p. 478.

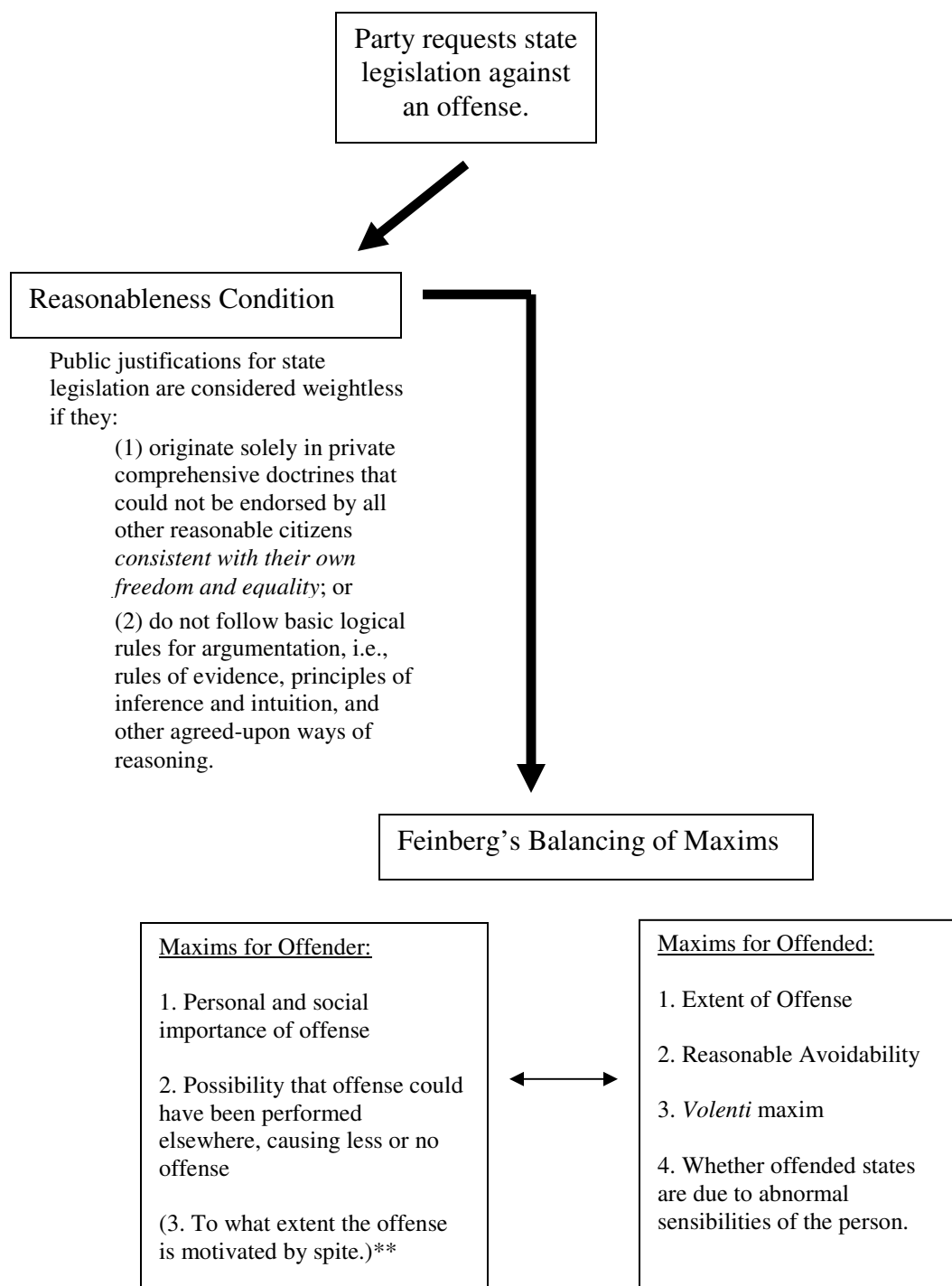
⁶⁶ This is similar to why a certain base level of etiquette is necessary. Etiquette provides us all with a common starting place to reasonably disagree.

⁶⁷ Devin DeBacker, “Considerations of Reasonableness in Feinberg’s Offense Principle,” p. 11. Clearly, reasonable people can reasonably disagree. Differing comprehensive doctrines of the good may be reasonably articulated and argued for, and this is indeed how diversity arises within the liberal state.

Before considering the scales of mediating maxims, arguments for criminalization of this couple's interracial activities would be subject to the RC. However, the offended party's arguments (e.g., the bigot townspeople's) against the interracial couple's public lunch would clearly violate the RC. The racists might argue that the couple's activity offends them because it exemplifies a mixing of the races that the racists find highly offensive (because it is immoral, sinful, etc.). However, this would be considered a weightless argument in the public domain under provision (a) of the RC; the racists' arguments for criminalizing the couple's lunch would fail to meet the demands of public reason. It would be inconsistent for the townspeople to argue from this private comprehensive doctrine (where interracial mixing is immoral) because it cannot be endorsed by all other reasonable citizens and remain consistent with their own freedom and equality. In essence, the racists' arguments for criminalization violate the very individual liberty and equality that any comprehensive doctrine must endorse in a liberal society. In this manner, the Reasonableness Condition can apply considerations of reasonableness without warranting an illiberal judgment by the state, as Feinberg was so concerned about.

The Reasonableness Condition should fit into Feinberg's existing offense principle by serving as a primary test or threshold that all argumentation for criminal legislation should pass before being subject to the mediating maxims. These revisions to Feinberg's offense principle can be summarized as follows on the next page:

**FIGURE 3-B:
REVISED OFFENSE PRINCIPLE**



** In Chapter 4, an argument is made for rejecting motivation as a mediating maxim of offensiveness.

The Priority of the Reasonableness Condition

The above diagram raises a final question for the reader. In our procedure of analyzing claims for state legislation, why should the Reasonableness Condition have priority over the balancing of mediating maxims? I offer three sets of arguments in support of its priority.

First, the Reasonableness Condition is a basic requirement of all arguments for legislation and a more objective test than the balancing of mediating maxims. The scales of mediating maxims will unavoidably depend - to some degree - on the legislator, judge, or citizen doing the balancing. There are difficult scenarios where reasonable people will reasonably disagree on how the mediating maxims balance, and that limit on balancing models is a necessary frustration for the liberal state. However, the requirement of public reasonableness is not a criterion which will rely on its user's ability to balance scales, but instead is dictated by logic and an ability to decipher the legislation's implications. If X is legislation that implies or results in Y, and Y is inconsistent with equal opportunity to pursue permissible comprehensive doctrines, then the liberal state cannot endorse X because it is publicly unreasonable.

Second, the priority of the Reasonableness Condition corrects serious flaws in Feinberg's analysis of offenses, whereby a widespread offended reaction in the majority can overrule the liberty of a minority. The earlier counterexample to Feinberg's original offense principle – the townspeople wanting to criminalize an interracial couple's publicly eating lunch – exemplifies the problem with widespread offended reactions. By correcting this flaw and accounting for such counterexamples, the Reasonableness

Condition moves the offense principle closer to being fundamentally fair in a liberal state, and away from depending on the subjectivity of balancing tests to determine outcomes.

Third (and most importantly), the subordination of the mediating maxims to the Reasonableness Condition equalizes the reasonableness of the maxims. Before the inclusion of the Reasonableness Condition, Feinberg excluded the reasonableness of an offending party's conduct as a criterion, but included reasonableness with regard to the offended party's reaction. The maxims related to the offending party's conduct were given less practical weight than the offended party's reaction by this exclusion; as a result, counterexamples (like the one of an interracial couple having lunch in public) tend to favor the offended party (and thus favor criminalization or legislation). Clearly, in the liberal society, the presumption is *in favor of* liberty and equal opportunity – not in favor of criminalizing individual behavior. The Reasonableness Condition effectively applies public reasonableness as a criterion to *both* sets of maxims (the offending party and the offended party), and restores the presumption in favor of liberty.

Chapter 4: The Harmful Offense Principle

Having shown that there exists a middle ground of criminalizable actions between those that are harmful and those that cause offense, I now set out to design a principle to demarcate the legitimate bounds of state intervention within this middle ground. In its simplest form, the harmful offense principle states that those actions which cause substantial harmful offense to others can be legitimately restricted by the state. I will use the two inconsistencies that were resolved and strengthened in chapters 2 and 3 in order to weave together the harmful offense principle and its mediating maxims.

Mediating Maxims of Harmful Offense Principle

It is not practical simply to state that “those actions which cause substantial harmful offense to others can be legitimately restricted by the state”; this is a statement of mere surplusage, devoid of useful content. To develop a pragmatic, guiding principle for legislators, it is necessary that circumstantial factors be considered (e.g., factors akin to Feinberg’s mediating maxims). I will first start with Feinberg’s mediating maxims for both the harm and offense principles and analyze each within the context of combined harmful offense. Those considerations that logically apply to both harm and offense will be retained and tested against our considered judgments and example cases, whereas those that are non-sequiturs to harmful offense will be discarded.

In order for a maxim to “logically apply,” it must further our knowledge about the ultimate wrongness involved in the given act. In the case of harmful offense, I established that the ultimate wrongness involved in harmful offense was the resulting infringement to two kinds of welfare interests: (G) general welfare interests, and (O) the specific welfare interest in not being offended. Thus, for any of the following maxims to apply logically,

they must further our understanding of a given act's infringement on these two kinds of welfare interests. For each maxim, I will use a combination of examples and theory to answer the following question: does this particular maxim provide relevant information to discern the type and degree of the particular welfare interests that are setback?

From the harm principle only:

De minimis maxim

Although it is not mentioned as a mediating maxim in the revised offense principle, the *de minimis maxim* is inherent in our definition of offenses. The very definition of offenses is so narrowly tailored as to exclude offenses of bare knowledge and those that fail the Reasonableness Condition. It is sensible, then, to apply the *de minimis maxim* to harmful offense, thereby excluding trivial or minor harmful offenses that the legislative and judicial systems are practically ill-equipped to handle.

*Risk = gravity * probability*

Risk is a necessary factor in determining whether a harmful offense is within the legitimate scope of the criminal law. Consider its role in cases of pure harm. A significant percentage of those acts which the state punishes (and seems to do so legitimately) turn on the *probability* and *gravity* of the act. For example, direct threats towards an individual's physical well-being are legitimately restricted by the government. Although the probability of a threat being carried out varies with each individual situation, the gravity of harm to the individual raises the risk of such threats to a level that is within the scope of the criminal law.

There is no difference in the case of harmful offenses; the risk of uncertain harmful offenses can be used to illuminate the degree of infringement upon the

victimized party's welfare interests. If Mary makes personally-threatening, graphically sexual comments to Susan, then Mary's harmful offense can be legitimately restricted or punished by the criminal law. Though we may not know the certainty of the act's occurrence, the act's gravity is sufficiently high as to warrant an investigation into its probability of occurring. This formula operates on a sliding scale. As the probability of the act becomes more likely (e.g., in the case of Mary's verbal threats), then the requisite gravity decreases to establish a legitimate cause for restriction (and vice versa). As the probability becomes less likely (e.g., in the case of Mary's poor attempt at nervous humor), then the requisite gravity increases to establish a legitimate cause for state coercion (and vice versa).

From the offense principle only:
Redeeming social value

Although redeeming social value is a consideration central to Feinberg's offense principle, it remains to be seen whether an act's social value could justify a situation of harmful offense. Using the example of *Scenario 1*:

Scenario 1: A group of mourners carrying a coffin sit in the park along your direct route. Their demeanor, however, is "by no means funereal. In fact they seem more angry than sorrowful, and refer to the deceased as 'the old bastard,' and 'the bloody corpse.' At one point they rip open the coffin with hammers and proceed to smash the corpse's face with a series of hard hammer blows."⁶⁸

This act could be legitimately punished and prohibited under the offense principle (as explained on page 23). Yet imagine a similar situation where the mourners are dressed as Uncle Sam, the body is of a fallen soldier, and they do so while chanting an anti-war slogan. The value of their speech can serve as a factor for determining the act's balance

⁶⁸ Feinberg, *Offense to Others*, p. 11.

between liberty and the infringement of others' welfare interests (in this case, harmful offense). For example, does the social value of their free speech in protesting the war provide them with an exception to punishment? Due to the great personal harm involved, I would argue 'no'; free speech, while almost universally protected, can be limited due to the manner in which it is expressed.

There are other situations where social value as a consideration can illuminate the balance between liberty and any resulting harmful offense. If the body was instead a lifelike replica of a specifically-identified, fallen soldier (and all other details of the scenario remained equivalent), the social value of the mourner's protest could then outweigh the harm done to the soldier. In this case, the harmful offense that occurs – the harm to the soldier (e.g., a damaged reputation) – and the offense to others (e.g., the public display of a realistic bodily mutilation) is mitigated by the social value of free speech. Any punishment, in this scenario, would depend upon how extensive the harmful offense is – whether this was a single or repeated act, how negatively the soldier's reputation and family were affected, etc.⁶⁹

Alternate opportunities (and reasonable avoidability)

Although it is sensible to speak of relocating offenses to another place, time, or manner where they could be less offensive and more acceptable (e.g., restricting nudity to one's home), requiring the same for harms is nonsensical. The circumstantial nature of offenses is an essential property of offenses alone. Offenses can be relocated in time,

⁶⁹ While I endorse an act's redeeming social value as a consideration of the harmful offense principle, this does not mean that any social value *per se* is the level of social value we might legally require. There are many possibilities here: requiring that the act be a "step towards social truth" found in *Chaplinsky v. New Hampshire*, the *Memoirs* standard of an act being utterly without social value, etc. However, the level of redeeming social value is a question beyond the scope of this thesis.

place, and manner precisely because their resulting infringement on another's right changes in accord with changes in such circumstances. It is hardly offensive to have sex in the privacy of one's home, whereas (arguably) doing the same in public is greatly offensive in some cultures.

However, harms do not have this defining circumstantial nature; instead, harms tend to be universal and static. John is harmed to a similar degree despite the contextual circumstances - whether Alex knifed in public, at night, or in China. In a similar way, it is nonsensical to speak of reasonably avoiding harms. A harm's infringement on someone's welfare interests and resulting rights is not mitigated if John walked through a violent urban area rather than driving through a less violent neighborhood. The chances of a harm occurring might differ, but the harm's infringement on John's liberty and rights is equivalent. For these reasons, it is reasonable to exclude *reasonable avoidance* and *alternate opportunities* from our list of considerations for the harmful offense principle.

Spiteful Motivation

Although Feinberg considers whether the offending party was motivated by spite, there is good reason to disagree with his assumption. Feinberg states that "wholly spiteful conduct, done with the intention of offending and for no other reason, is wholly unreasonable."⁷⁰ He also clearly believes that:

By and large the offending person's motives are his own business, and the law should respect them whatever they are. But when the motive is merely malicious or spiteful it deserves no respect at all. Offending the senses or sensibilities of others simply for the sake of doing so is hardly less unreasonable than harming the interests of others simply for the sake of doing so.⁷¹

⁷⁰ Feinberg, *Offense to Others*, p. 44.

⁷¹ *Ibid.*, p. 41.

We need only examine a relevant example to see why motivation as a mediating maxim fails; ultimately, in a pluralist society, motivation as a mediating maxim veils the legislation of a single comprehensive doctrine to the detriment of others. This is evident in Feinberg's comment that a malicious or spiteful motive "deserves no respect at all." Consider the facts of *Cohen v. California* (1971). Cohen peacefully and quietly wore a jacket containing the written statement "Fuck the draft" into a Los Angeles courthouse. The offense (or lack thereof) of Cohen's jacket does not depend on Cohen's intentions, but rather on the actual act itself. Certainly his jacket does not infringe others' welfare interest (in not being offended) in a greater way if his motivation was spiteful towards the court or towards a specific individual. In other words, his jacket does not become more offensive if his motivation for wearing the jacket was spiteful (and his jacket does not become less offensive if he intended to display a political statement regarding conscription) because the nature of an offense does not turn on the actor's intentions. As a result, motivation should not be used as a mediating factor to determine whether a potentially offensive action falls within the realm of legitimate criminalization.

Extent (intensity, duration, scope of effect)

The extent of a harmful offense is directly related to its degree of infringement to others' two-fold welfare interests. The more intense, the longer lasting, and the more widespread a harmful offense, the more likely that it infringes a greater number of people's welfare interests more negatively. Conversely, the less intense, the shorter, and the less widespread a harmful offense, the more likely that the act infringes a lesser number of people's welfare interests less negatively. As a result, the more extensive the

harmful offense, the more legitimate its restriction. (This does not preclude a harmful offense from being restricted by the government if the victimized party is only one individual, but rather requires that the act's other effects – its risk, duration, intensity, etc. – be greater.)

From both:

Volenti maxim and *abnormal susceptibilities / sensibilities*

Just as in the cases of the offense and harm principles, the *Volenti maxim* and *abnormal susceptibilities / sensibilities* are informative as to the degree of an act's violations of others' two-fold welfare interests. If one has an interest in not being offended or harmed – and yet fully consents to a given act – any complaint that individual lodges for legitimate state intervention has been void. The same holds for a harmful offense as well. If our workplace harasser Mary makes verbally forcible, sexual advances towards Susan, and Susan fully consents to them insofar as she reciprocates the advances, Susan has no claim against Mary for any harmful offense. (This is not to say that Susan has no recourse of any kind; if Susan playfully returns Mary's advances, but then ceases her consent once Susan becomes too threatening, then Mary has a legitimate claim against Susan's sexual harassment.)⁷²

In a similar manner, abnormal sensibilities of the affected party afford no weight to the complainant's arguments for state intervention. If John is particularly vulnerable to the Portuguese language and finds it sexually threatening (say, due to its sensual tones), we cannot make the speaking of Portuguese a criminal offense simply because a minority

⁷² This is clearly an ambiguous situation. There are certainly cases in which Susan may not have *fully* consented because she was under the impression that Mary was joking, did not understand the subtle nature of the statements she was reciprocating, etc.

(or majority, for that matter) of the population is particularly vulnerable for it.⁷³ As

Feinberg points out:

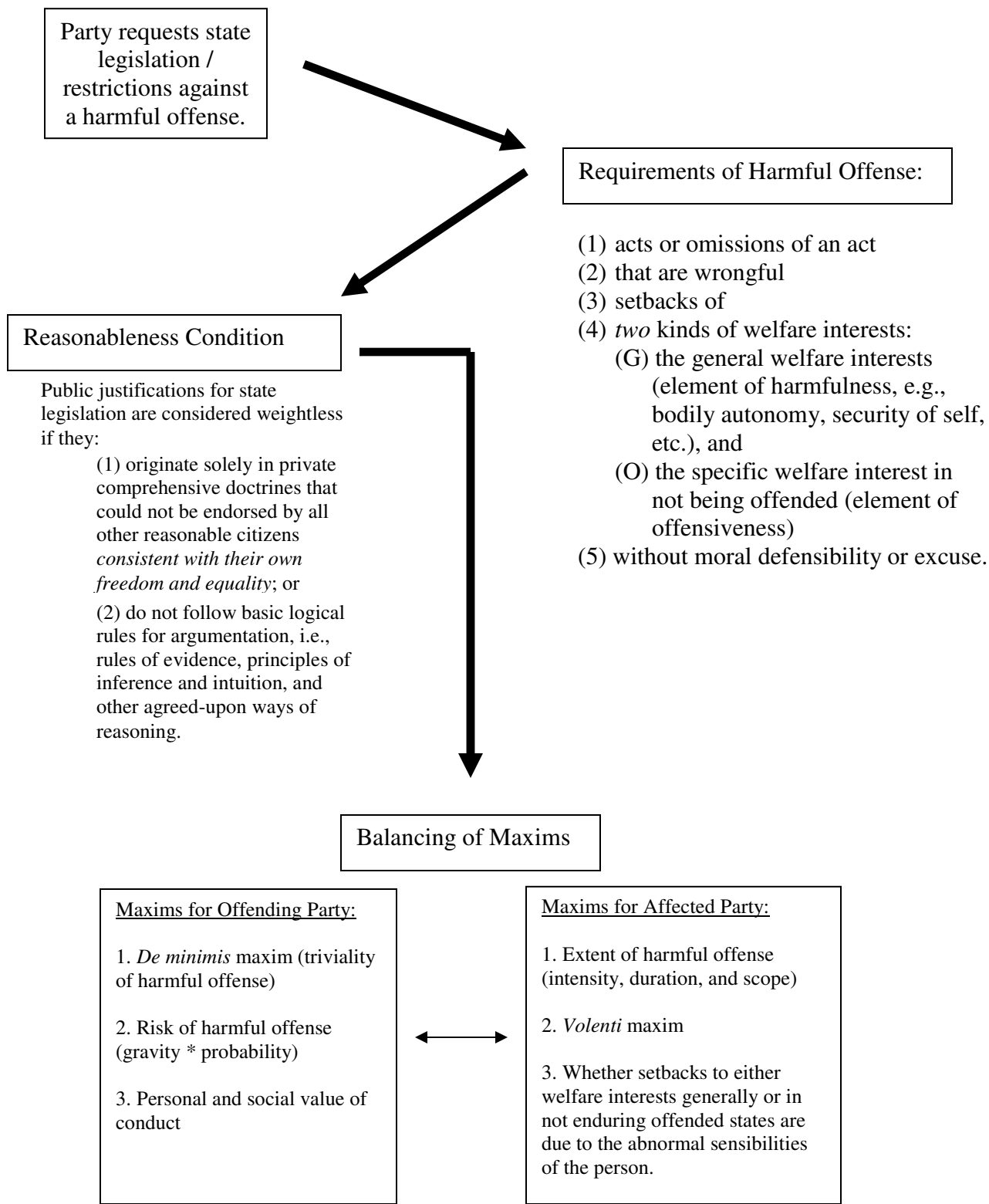
Unlike special vulnerabilities to harm, however, abnormal susceptibilities to offense find more appropriate legal protection against malicious exploitation through means other than the criminal law, for example, through injunctions, civil suits, or permitted private “abatement.”⁷⁴

Now that we have sorted the basic mediating maxims of the harmful offense principle, it is important to see how all of these maxims, definitions, and conditions interact within the broader application of the principle:

⁷³ Giving *no weight* to justifications stemming from particular vulnerabilities only seems to hold true for offenses and harmful offenses. As far as pure harms are concerned, there is *some* (not complete) weight given to complainants with particular sensibilities. For example, blindness and deafness are afflictions because of which the state can legitimately establish certain regulations for other citizens when harm might result (e.g., setting lower speed limits in a neighborhood where deaf children live). There is still, however, a burden placed upon individual with such particular vulnerabilities to provide safety and protection for themselves against harms which they may be susceptible to.

⁷⁴ Feinberg, *Offense to Others*, p. 41.

FIGURE 4-A:
Diagram of the Harmful Offense Principle



The Need for a Separate Harmful Offense Principle

The natural question is why a harmful offense principle is necessary, and why existing harm and offense principles could not shoulder the burden of acts that fall into this middle ground. To see why the harm and offense principles fail to mediate these acts, consider an example of sexual harassment in the workplace involving acquaintances Boss Bob and Secretary Sue.

If Bob is naturally aggressive and interested in Sue, it is very plausible that Bob might approach Sue with what he considers a compliment – e.g., by commenting on her body. Although Bob makes the comment in an aggressively flirtatious manner, Sue is offended and her workplace autonomy is setback (however slightly) by his verbal aggression. The harm principle could conceivably allow punishment of this incident due to its failure to consider the largely normative nature of the incident. In other words, the harm principle does not consider that there may be some overriding contextual considerations of the incident – e.g., the personal importance of Bob’s way of flirting to his dating lifestyle, the extent (duration, intensity, and scope) of the harmful offense, etc. Overall, the harm principle fails to mediate appropriately acts of harmful offense because it is too restrictive on individual liberty. Due to the highly normative nature of harmful offenses established in chapter 2, any principle that analyzes such acts must involve considerations of the personal / social value and extent of the acting party’s conduct. If used to analyze harmful offenses, the harm principle would effectively use non-normative maxims to examine largely normative acts.⁷⁵

⁷⁵ This example may seem like a stretch for what is an intuitive but inaccurate reason: someone might reject the idea that Sue would feel a requisite level of violation in order to legally complain. However, if Sue has some abnormal sensibilities or susceptibilities to aggressive flirting (say, because of a past marriage or

What if Bob instead comes into the office every day and makes loud, sexually-graphic comments that are not physically directed to Sue or any other individual, but which discuss raping women in general? The offense principle might fail to criminalize such blatant sexual harassment because (1) the speech could be considered the exposition of ideas, thus protecting it as personally and socially important, and (2) the offense principle is not concerned with the setbacks to any female coworkers' personal autonomy (e.g., harm) that result from the hostile workplace environment. An analysis under the offense principle fails due to its inability to consider appropriately the non-normative component of harmful offense – the fact that there are setbacks to other welfare interests (besides the specific interest in not being offended). The failures of the harm and offense principles to precisely analyze harmful offenses points to the need for a separate harmful offense principle.

Criticisms and Responses

Nietzscheans reading this principle might protest at the sight of these “mediating maxims,” arguing that they are methods of hiding one’s own morality behind the forms of theoretical abstraction.⁷⁶ Certainly other philosophers have criticized Feinberg in this regard, claiming that his maxims are morally-based, even though Feinberg explicitly rejects the use of any presupposed moral system. Since the harmful offense principle requires an acceptance of Feinberg’s basic arguments for the harm and offense principles,

relationship), then this is a problem for the harm principle as well. As discussed earlier, the harm principle must afford some weight to abnormal susceptibilities (e.g., a person with hemophilia, blindness, deafness, etc.). In doing so would have to afford some weight to Sue’s particular vulnerabilities.

⁷⁶ I am grateful to professors Tim Costelloe and Kevin Honeycutt for pointing out this well-founded criticism.

the mediating maxims of the harmful offense principle are also subject to this same Nietzschean criticism.

However, I would argue that the maxims are not grounded in any one personal bias or morality, but instead are pragmatic factors used to determine the line between individual liberty and infringements into others' welfare interests. They are empirical considerations that can be used to advance our knowledge of an act's consequences on others' rights and welfare interests. As such, these maxims *must* relay information about external considerations of the context of a given act. Considering such external information is not only amoral, but necessarily pragmatic to transcend abstraction and make the harm, offense, and harmful offense principles useful to statesmen.

Perhaps Nietzsche would not object to an inclusion of the maxims themselves, but instead to the way Feinberg *selects* the relevant maxims, and here I do not disagree. Feinberg borrows and transforms his maxims from long-held traditions of common law and U.S. tort (personal injury) law. He does not seem to analyze whether his maxims are related to furthering our knowledge of an act's impact on others' rights and welfare interests. This is where my method differs, and why I exclude "spiteful motivation" as a maxim – for it does not help us know whether a given act results in a greater or lesser infringement of another's welfare interests.

Another criticism revolves around our formulation of a reasonableness criterion. In "Coercive Restraint of Offensive Actions," Donald VanDeVeer considers and rejects such a criterion, after analogizing the states of persons "offended unreasonably" of those physically distraught states of an allergy sufferer:

Such a standard gives "no weight" as it were to distresses associated not just with statistically unusual beliefs (if they are) but *unreasonable* ones. An obvious

difficulty with this principle would be sorting reasonable and unreasonable beliefs. Let us assume the beliefs are “evidently irrational.”...My analogous case is that of persons suffering from severe allergies. Allergic persons are vulnerable to severe distress and suffer it when “in touch with” what are, for most, innocuous substances...Must we cater to these eccentric sensibilities? The answer is: of course – to some extent...Similarly, the vulnerabilities to distress of those with even downright irrational beliefs or bizarre sensibilities cannot be disregarded...A principle of offense which gave no consideration to bizarre sensibilities or beliefs would, for reasons suggested, be indefensible. Hence, the Reasonableness Standard is in fact unreasonable.⁷⁷

Essentially, VanDeVeer argues that *some weight* should be given to unreasonable arguments for state intervention against certain offensive (or harmfully offensive) acts.⁷⁸

By contrast, the Reasonableness Condition developed in chapter 3 gives *no weight* to publicly unreasonable justifications. There are two problems with VanDeVeer’s suggestion. First, VanDeVeer conflates a reaction due to “bizarre sensibilities” and a reaction that is “statistically normal but [still] unreasonable.”⁷⁹ Individuals with particular vulnerabilities (“bizarre sensibilities”) are not necessarily “evidently irrational,” as VanDeVeer assumes. Using the distinction between rationality and reasonableness laid out in chapter 3, an individual may have a very (prudentially) rational yet highly unreasonable belief. It may be prudentially rational for John to be offended by pornography because it is an effective way to achieve some specific end (e.g., to appear modest in front of women), but John’s belief may be privately unreasonable because it is inconsistent, incoherent, or unstable with the rest of his belief-system or publicly unreasonable.⁸⁰

⁷⁷ Donald VanDeVeer, “Coercive Restraint of Offensive Actions,” *Philosophy & Public Affairs* 8, no. 2 (1979), p. 181.

⁷⁸ Ibid.

⁷⁹ Shoemaker, “‘Dirty Words’ and the Offense Principle,” p. 562.

⁸⁰ Ibid., p. 553.

Shoemaker offers another reason why VanDeVeer's above analysis is flawed.

Shoemaker draws an important distinction between VanDeVeer's allergy analogy and offended reactions:

...many offended reactions are either reasonable or unreasonable, whereas allergic reactions are neither. The negative normative assessment we may coherently make with regard to certain offended reactions – “You shouldn’t be offended by such things” – quite simply cannot sensibly be made to someone suffering from a severe allergic reaction. For example, it would be nonsensical to say to someone allergic to dairy products, “You shouldn’t be allergic to cheese.”⁸¹

As such, the analogy fails to hold, and the Reasonableness Condition will give no weight to any claims resulting from publicly unreasonable arguments for legislation against harmfully offensive (or purely offensive) acts.

⁸¹ Ibid., p. 563.

Chapter 5: Summary

Before applying the harmful offense principle to a particular case, I offer a summary of what I have argued in Part I.

- ❖ Offensiveness is neither a disparate concept nor a subset of harmfulness. Instead, offense and harm have related properties. They are both wrongful setbacks to welfare interests, but the kind of welfare interest with which each is concerned differs according to its normative status. Harms involve setbacks to non-normatively-defined welfare interests generally (other than the interest in not being offended), whereas offenses involve setbacks to the normatively-defined welfare interest in not being offended. This relationship of harm and offense produces a spectrum, along which wrongful setbacks to welfare interests vary by the degree to which they are normatively-defined.
- ❖ Rationality is an economic value that we may impose on our lives in order to achieve best our own interests and goals. If an individual lacks the mental faculties to choose the best way to achieve his own interests, that person is competently irrational; an individual who has the ability to make decisions that best further his own goals, but voluntarily rejects rationality as a value, is said to be prudentially irrational. Contrarily, reasonableness is not an economic value, but instead the measure of an argument's or comprehensive doctrine's consistency, either internally (private reasonableness) or externally (public reasonableness). The addition of a Reasonableness Condition to the offense principle is necessary to prevent widespread offenses from being criminalized due to an imbalance in the mediating maxims of Feinberg's offense principle.

- ❖ Harmful offense is a product of this gradient, and includes a narrow class of acts that include both substantial harm and offense. A new principle and mediating maxims are required to determine whether a given harmful offense is within the legitimate scope of the criminal law. There may be other mediating maxims and practical considerations that legislators and social scientists find reasonable to include in the harmful offense principle, but the ones I have expounded are the minimum necessary for the principle's effectiveness.
- ❖ Arguments are not made for the general acceptance of this proposed relationship between harm and offense and for the existence of harmful offense independently of Feinberg's harm and offense principles. Instead, accepting the proposed relationship of harm and offense (as well as the resulting harmful offense principle) requires an acceptance of the liberal position, defined by the use of the harm and offense principles. (If the reader instead subscribes to the sovereignty principle and rejects the use of harm and offense in determining the scope of the criminal law, then I cannot expect the reader to accept my explanation of the relationship between harm and offense.)

Part II: Case Study: The ‘New’ Child Pornography

Chapter 6: Background

Part II is an application of the theoretical arguments and principles established in Part I to a contemporary legal case. In Part II, I analyze the current legal dilemma surrounding the criminalization of virtual- and youthful-looking child pornography, using the harmful offense principle to determine whether the “new” wave of child pornography falls within the legitimate scope of the criminal law. Before doing so, however, a certain amount of historical and legal background concerning the treatment of freedom of speech, freedom of expression, and obscenity is necessary.

Free Speech and the First Amendment

The First Amendment states that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.⁸²

It is well known that the First Amendment establishes freedom of speech, and that freedom of speech is not restricted to merely spoken and written words. Under historical interpretation, freedom of *speech* constitutes freedom of *expression*, including spoken and written words, purely symbolic speech (e.g., flag-burning), individual or group behavior, works of art, images and photographs, movies and theater performances, and video games. The First Amendment, however, has not been interpreted as an individual’s *carte blanche* to express oneself in *any* manner, and so not all conduct expressing speech (i.e., the behavioral manners by which speech is expressed) are protected by the amendment. Most notably, general examples of unprotected speech include libel or

⁸² U.S. Constitution, amend. I. As with some other parts of the Bill of Rights, the First Amendment applies – in addition to the federal government – to state and local governments through the legal doctrine of incorporation of the Bill of Rights, under the Due Process Clause of the Fourteenth Amendment.

slander, threats or so-called “fighting words,” behavior or speech that results in direct obstruction of justice, harassment, and obscenity. It is this last category – obscenity – on which my challenge to the Supreme Court will focus. Specifically, this challenge is to its 2002 decision in *Ashcroft v. Free Speech Coalition* which effectively legalized both virtual child pornography and youthful-looking adult pornography that is marketed as child pornography.

The Supreme Court has long held that obscenity is not a protected form of expression, mainly due to its lack of expressing any coherent speech:

There are certain well-defined and narrowly-limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...[S]uch utterances are of no essential part of the exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁸³

Miller v. California (1973)

Defining what constitutes obscenity, however, is a problem unto itself. In 1973 in *Miller v. California*, the Court drafted its current version of obscenity tests – those requisite criteria which speech must meet in order to be criminalized. In order to criminalize speech as obscene, the *Miller* tests require that the speech must:⁸⁴

- (1) appeal “strictly to a prurient interest”;
 - (2) depict sexually explicit conduct “in a patently offensive way”; and,
 - (3) (as a whole) must “lack serious literary, artistic, political, or scientific value.”
- ([S]LAPS test)

If all three criteria are satisfied, then the speech constitutes obscenity (and is thus unprotected by the First Amendment). In (1) and (2), “contemporary community

⁸³ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); upheld in *Roth v. United States* (354 US 476 1957);

⁸⁴ *Miller v. California*, 413 U.S. 22 (1973)

standards” (rather than national standards) are given the weight of judgment to determine if speech either appeals “strictly to a prurient interest” or depicts sexually explicit conduct “in a patently offensive way.”⁸⁵ Additionally, unlike earlier obscenity tests, the judgment of a “reasonable” or “average” person (rather than the most sensitive person in the community) is used to make determinations of (1), (2), or (3).⁸⁶

It is important to note that the *Miller* test cannot be used to criminalize the mere private possession of obscene speech (e.g., in one’s own home), but rather the buying, selling, or distribution of such speech in the public sphere. The Court essentially held that the First Amendment grants a constitutionally-protected right merely to possess adult pornography within the privacy of one’s home, but that there is no constitutional right to distribute, sell, or buy such pornography.⁸⁷

New York v. Ferber (1982)

Following the establishment of the three-pronged *Miller* test, the Court considered the relationship of child pornography to the *Miller* test in *New York v. Ferber* in 1982. The *Ferber* Court categorized child pornography – where there is any depiction of a minor engaging in sexually explicit action – as an exception to the *Miller* test. This ruling criminalized child pornography altogether, whether or not an argument could be made for its not satisfying the *Miller* test of obscenity. Prior to this ruling, if an argument could be made for some child pornography having a serious artistic value, then those cases of child

⁸⁵ Ibid.

⁸⁶ Ibid., p. 24.

⁸⁷ Many adult pornography producers argue against the Court’s rejection of a constitutional right to distribute, sell, or buy pornography. They argue that if a constitutional right to privately possess pornography is established, then that constitutional right to possession cannot be effectively enforced unless there is also a similar right to distribute, buy, and sell the product. So far, however, this argument has found little support in the courts.

pornography would not be criminalized as obscene (for failing to satisfy (3) of the *Miller* test). After this ruling, the private possession, distribution, buying, or selling of child pornography was criminalized outright (without any consideration of its satisfying the *Miller* test).⁸⁸ In other words, child pornography does not need to be legally obscene under *Miller* in order to be banned (because it is obscene *per se*).

In its ruling, the Court determined that the state had a compelling interest in preventing the sexual exploitation of children, and that the private possession of child pornography (involving minors engaged in sexual activity) was “intrinsically related” to the sexual abuse of children.⁸⁹ The distribution of child pornography through buying, selling, and advertising provided an economic motive for producing child pornography, and is also intrinsically related to the sexual abuse of children. As a side note, the Court also found that child pornography has negligible, if any, artistic value. As a result, the Court held that child pornography does not receive First Amendment protection and that it does not need to meet the legal tests for obscenity in order to be banned.⁹⁰

Ashcroft v. Free Speech Coalition (2002)

In 2002 in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down two parts of the 1996 Child Pornography Prevention Act (CPPA) that expanded the scope of the definition of criminalized child pornography. Prior to the CPPA, child pornography was recognized by the *Ferber* Court as “sexually explicit images involving real minors as

⁸⁸ The Court implied in *Ferber* that “a work which, taken on the whole, contains serious literary, artistic, political or scientific value may nevertheless embody the hardest core of child pornography,” but also stated that such a work’s value is irrelevant to its resulting harm. *New York v. Ferber*, 458 U.S. 761 (1982)

⁸⁹ *Ibid.*, p. 759.

⁹⁰ *Ibid.*, p. 761.

actors.”⁹¹ When the CPPA was passed in 1996, the act expanded the definition of child pornography to include:⁹²

- (1) any visual depiction that is or appears to be of a minor engaging in sexually explicit conduct;
- (2) any sexually explicit image produced through computer morphing;⁹³ or,
- (3) any sexually explicit image that is advertised in such a manner so as to convey the impression that a minor is engaging in sexually explicit conduct.

In *Ashcroft*, only (1) and (3) were challenged as to their constitutionality.⁹⁴ The Court found that (1) and (3) could apply to both virtual child pornography (where the images use no real actors), and youthful-looking adult pornography that is presented as or strongly suggestive of using child actors. Since the CPPA could prohibit child pornography that does not depict an actual child actor, the majority opinion wrote that these two statutes of the CPPA could not be upheld under the reasoning of *Ferber*.

The primary question before the Court became whether these two categories – images that “appear to be” or “are pandered as” child pornography – are constitutional since they possibly prohibit a realm of speech that is neither obscene (under the *Miller* tests) nor actual child pornography (under *Ferber*).⁹⁵ In its decision the Court struck down these two prohibitive statutes of the CPPA, ruling that both were unconstitutional because they were overbroad and might apply to (and thus ban) a substantial realm of valid speech. For example, the Court feared the application of these statutes in banning

⁹¹ *Ibid.*, p. 765.

⁹² CPPA, 18 U.S.C. 2256(8) (1996)

⁹³ Computer morphing is a process by which real children’s innocent images are altered so as to appear to be of children engaging in sexually explicit conduct.

⁹⁴ The constitutionality of defining child pornography as sexually explicit images of children produced through computer morphing was not considered by the *Ashcroft* court, and thus remains banned by the CPPA.

⁹⁵ *Ibid.*

contemporary Hollywood movies (such as “Traffic” or “American Beauty”) or Shakespearean plays that graphically “give the impression” of minors engaging in sex.⁹⁶

The Court’s secondary reasoning for allowing virtual child pornography and youthful-looking adult porn that is pandered as child porn (hereafter referred to as “youthful-looking child pornography”) rests on the claim that no sufficient harm is done to any child actors. Under *Ferber*, the Court automatically criminalized child pornography because of “the State’s interest in safeguarding the physical and psychological well-being of minors.”⁹⁷ However, the Court reasoned that due to the lack of any actual child actors in either virtual or youthful-looking child pornography, there can be no harm to any minors. As a result, the Court concluded that there was no legal support under *Ferber* in banning either virtual or youthful-looking child pornography, and struck down the two statutes.

⁹⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. 247 (2002)

⁹⁷ *New York v. Ferber*, 458 U.S. 757 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 597, 607 (1982)

Chapter 7: Application of a Harmful Offense Analysis

This chapter will be devoted to examining *Ashcroft v. Free Speech Coalition*, the case of virtual and youthful-looking child pornography. I will first show what reasons can be given for the criminalization of distributing such child pornography through the use of the harmful offense principle. Then I will explain how the Court's reasoning is inconsistent with its precedent cases and why there is good reason to doubt the justice's stated reasons for not criminalizing the public distribution of such child pornography.

An Analysis of the Harmful Offense Involved

I will limit my application of the harmful offense principle and later analysis to the public distribution, advertising, buying, and selling of these new types of child pornography.⁹⁸ The public distribution of virtual and youthful-looking child pornography falls within the scope of harmful offense (and neither pure harm nor pure offense alone).

The distribution of such child pornography is:

- (1) an act
- (2) that is a wrongful
- (3) setback to
- (4) two kinds of welfare interests:
 - (G) general welfare interests
 - (O) the specific welfare interest in not being offended
- (5) without moral defensibility or justification.

Obviously, any controversy that arises does so from the claims made in (2), (3), and (4).

As a result, there are two central questions (before the mediating maxims are considered) that must be answered by the party arguing for criminalization:

⁹⁸ This does not include mere private possession of virtual or youthful-looking child pornography. For further information about the Court's rationale related to the private possession of such pornography, see *Williams v. United States*, docket #06-694 (2007), a case currently before the Court involving the criminalization of pandering child pornography even if you lack actual possession.

- ❖ How does such child pornography violate a right, and whose right does it violate (considering there is no actual child actor)? [(2)]
- ❖ How does virtual and youthful-looking child pornography setback both general welfare interests and the specific welfare interest in not being offended? [(3) and (4)]

As to the first question, recall that – according to Feinberg’s system – a legal right (or claim) arises purely as a consequence of having an invested welfare interest. That is, whatever one has an invested welfare interest in is something to which the individual also has a legal right. Also recall that welfare interests are not limited to individuals, but may also extend to communities and governments. In the case of this new child pornography, I would argue that a community interest exists in preventing the over-sexualization of children (who are some of the most vulnerable members of any community). There also exists a government interest in preventing the over-sexualization of children in the public sphere (e.g., in order to maintain a certain baseline of public order or to prevent costs incurred due to rising teenage pregnancies). From the evolution of these government and community interests arises a public legal right that can be violated in the same way that an individual right is violated.

Perhaps the community welfare interest in preventing the over-sexualization of children is not a tenable position for the Justices to hold. There are other possible welfare interests at stake here that merit discussion – most notably, the governmental welfare interest in “conducting trials and court hearings” and pursuing justice generally. As noted in both the Government’s brief and the concurring opinions in *Ashcroft*, Congress has a “compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and [the Court] should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so.” According to Congress,

technological advancements in virtual child pornography would cause severe interference with the prosecution of child pornography portraying actual minors, as the virtual and non-virtual products are already nearly indistinguishable.⁹⁹ In this case, virtual child pornography could be legitimately proscribed insofar as it setbacks the governmental welfare interest (and thus violates the government's right) in curbing actual child pornography.¹⁰⁰

As to the second question, we must turn to the effects of virtual and youthful-looking child pornography as it is distributed and marketed in the public sphere. Virtual and youthful-looking child pornography setback the aforementioned community and government interests generally as well as a community interest in not being offended (e.g., the combined interests of all the average people within the community in not being offended). As to the general welfare interests, such child pornography can clearly not be said to setback any specific individuals' interests in minimum physical or mental health, security of private property, bodily autonomy, and the like. However, the community's general welfare interest (in not having children that are themselves over-sexualized or done so in the media) is clearly setback by a public distribution of simulated child pornography. Specifically, allowing the distribution and marketing of simulated child pornography in the public sphere necessarily makes a normative statement: it is acceptable for adults to engage in sexual activity involving children. This normative

⁹⁹ The case may be made that youthful-looking child pornography could be rendered indistinguishable from actual child pornography, and similarly violate the rights and setback the welfare interests of the government. However, I am not prepared to make that claim here.

¹⁰⁰ It may sound strange to speak of the "government's rights." However, as Feinberg points out, governmental interests "in the last analysis belong to individual citizens. But the maintenance or advancement of a specific governmental interest may be highly dilute in any given citizen's personal hierarchy." So while we may speak of governmental rights, it is important to remember that they are, first and foremost, the rights of individuals that are so "widely shared" and "generated in the very activities of governing" that they are ascribed to the government. Feinberg, *Harm to Others*, p. 63.

statement clearly defeats the general welfare interests of the community; for example, if it is publicly acceptable for adults to engage in sexual activity involving children, then children are less likely to report cases of actual abuse.¹⁰¹ For the average American, the public sexualization of young children ranks as one of the most offensive displays possible, and would be a personal affront to the citizens in the community (not relying on bare knowledge of its existence).¹⁰² Indeed, the Court stated in *Paris Adult Theater I v.*

Slaton:

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.¹⁰³

There may be some lingering doubts as to the force of the above argument. For instance, why is the prevention of over-sexualizing the most vulnerable members of a community a welfare interest (which can be legally protected) instead of a focal aim (which largely cannot be legally protected)? To understand why it is a welfare interest (and not a focal aim), it is useful to look at the role of protecting children within the liberal society. A certain minimum protection of young children's sexuality (as much as ridding the streets of violent gangs) is necessary to the basic flourishing of any given community. Also, such a basic protection furthers the liberal society's goal of affording

¹⁰¹ Of course, one could make the opposite claim: that *not* allowing simulated child pornography in the public sphere normatively endorses a restriction on individual liberty, etc. However, this is why I have included a discussion on other welfare interests at stake that may be setback by such conduct in the public sphere. See also Bryant Paul and Daniel G. Linz, "The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior," *Communication Research* 20, no.10 (2007), pp. 1 – 36.

¹⁰² I do not discuss the possibility that allowing simulated child pornography to be distributed and marketed in the public sphere is *not* offensive to the average American. This seems – especially in light of current and historical standards – an implausible position to hold.

¹⁰³ *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973)

the next generation equal opportunity to “enjoy and pursue the good life.”¹⁰⁴ Over-sexualization in the public sphere of a community (as mentioned before) decreases the reporting of the sexual abuse of children, increases the acceptance of younger pregnancies (the health and social costs of which the community and government must bear).¹⁰⁵ Since this is so central to the basic pursuit of equal opportunities, it is more appropriately construed as a welfare interest rather than a focal aim. A community’s focal aims might include such goals as increasing the proportion of its citizens that obtain Ph.D.s in philosophy or neighborhood beautification projects.

There may also be the objection that we cannot legislate solely to protect the most vulnerable members of a community at the expense of the liberty of other citizens. However, I do not argue that we should do so at the expense of others’ individual liberty. Instead, we must balance the protection of those with particular vulnerabilities with the importance of free speech in the exposition of ideas. We surely cannot make sweeping criminal statutes simply to protect the children of a community. Compare the case of distributing simulated child pornography to the example of using vulgar words in public. We may wish to legislate against using vulgar words in public (in order to protect the vulnerabilities of nearby children), but doing so interferes with an important manner of expressing certain ideas. In other words, vulgar words have an important social and political value that prevents their criminalization.¹⁰⁶ However, simulated child pornography (as determined by the Court in *Ferber*) does not have any such serious value

¹⁰⁴ Simester and von Hirsch, “Rethinking the Offense Principle,” p. 281.

¹⁰⁵ Note that this is an intentionally-limited argument. I do not argue that over-sexualization of children *anywhere* is the business of community welfare interests, but rather only the over-sexualization of children in the public sphere of the community.

¹⁰⁶ I cannot make this argument fully here, but see David Shoemaker, “Dirty Words and the Offense Principle” and Harry Frankfurt’s “On Bullshit” for a further explanation of why vulgar words are necessary to express certain ideas in ways that their synonyms cannot.

to the exposition of ideas, and so is open to criminalization. My point has not been to *prove* that the distribution of child pornography is a harmful offense worthy of criminalization, but rather to show that it appropriately falls within the realm of harmful offense (and neither harm or offense).

Balancing of Mediating Maxims

Once we have established that simulated child pornography falls within the realm of harmful offense, the next serious analysis comes through the balancing of the harmful offense principle's mediating maxims.¹⁰⁷ Consider the following "standard" example of distributing or marketing simulated child pornography. In the town of Complaintsville, the company Porn-R-Us distributes very graphic flyers promoting a new adult video store that is now renting videos of simulated five year olds having sex with each other and with family members. The citizens of Complaintsville go before the Bureau of Harmful Offense and argue for legislation criminalizing the public distribution or advertising of simulated child pornography.

On the part of the offending party (Porn-R-Us), the Bureau must analyze the following:

1. *De minimis maxim* (the triviality of the act): The distribution triviality has yet to be determined, but the townspeople's reasonable reaction seems to indicate that the matter is not trivial.

¹⁰⁷ The Reasonableness Condition's application to the current case is not included for reasons of brevity and practicality. As the justifications are laid out in this chapter, they pass the RC because they do not (1) derive from comprehensive doctrines that are inconsistent with the basic freedom and equality of the liberal society, and (2) (hopefully) do not violate the laws of logic and general ways of reasoning. It is conceivable that an individual could make unreasonable arguments for the criminalization of such child pornography – say, by labeling it as antithetical to the morals and modesty of Christianity – but my analysis assumes a reasonable method of argumentation.

2. Risk of harmful offense (gravity * probability): The distribution of such graphic flyers of simulated child pornography is nearly certain set back the townspeople's welfare interest in not being offended and likely to set back the community interests established in the previous section.
3. Personal and social value of conduct: Besides providing a public market for a small population of those who find children sexually attractive, there is negligible value in the *distribution* of such flyers.¹⁰⁸

On the part of the affected party (the townspeople and the community), the following maxims must be examined:

1. Extent (intensity, duration, and scope): The flyers are stapled to lamp posts, passed out to individuals, and dispersed on public walkways near the town's business center. Their duration lasts until they are removed by the townspeople or government street-cleaning crews, and the scope of the act affects all of the townspeople who work in the business center.
2. *Volenti* maxim: There is no sense in which the townspeople or community have explicitly consented to being subject to the distribution of these flyers.
3. Abnormal sensibilities: The reaction of the townspeople is not due to any unreasonable or abnormal susceptibilities of the particular individuals.

As far as this example is concerned, the balancing of mediating maxims seems to allow for the criminalization of the marketing and distributing of simulated child pornography.

Of course, the example can be tweaked so that the mediating maxims may prevent criminalization, but the important conclusion is that there are situations in which harmful

¹⁰⁸ This does not go so far as to argue that there is no personal or social value in the possession and private viewing of simulated child pornography – just its public distribution.

offense will allow the legitimate criminalization of simulated child pornography in the public sphere.

Where the Supreme Court Went Wrong

This analysis of simulated child pornography can be extended to the Supreme Court's specific reasons for striking down the CPPA. First, the Supreme Court was concerned with the CPPA's overbreadth and its potential to criminalize valid speech, such as "Romeo and Juliet" or "American Beauty." However, in doing so, the CPPA's restrictions are taken beyond the very context to which it was originally restricted, namely, that of hard core "sexually explicit conduct." The definition – read as a whole in context – only targets the "sort of hard core child pornography that was found without protection in *Ferber*." The CPPA's definition of child pornography as "any sexually explicit image that is, appears to be of, or is pandered as child actors engaging in sexually explicit conduct" should not be taken beyond the realm of "sexually explicit conduct." When read in this correct context, the CPPA bans visual or graphic depictions of youthful-looking, virtual, or actual child actors engaging in *actual* sexual activity, yet the CPPA would not apply to mere *suggestions* of such activity that are found in Hollywood movies or Shakespearean plays. Thus, the Shakespearean tragedies, teenagers' hand-drawn cartoons, and Hollywood movies that the Court was concerned about (e.g., "Traffic" or "American Beauty") would remain protected under the First Amendment. Virtual and actual child pornography – as well as pornography made with youthful-looking adult actors that is pandered as child pornography or made with computer-morphed images of real children – would be banned under this reading of the CPPA.

Indeed, Chief Justice Rehnquist dissented from the majority opinion in *Ashcroft* for precisely this reason:

Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA's definition of "sexually explicit conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of:

"Actual or simulated...sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ... bestiality; ...masturbation; ... sadistic or masochistic abuse; ... or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. §2256(2)."

Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber, supra*, at 772-774. ... But the inclusion of "simulated" conduct, alongside "actual" conduct, does not change the "hard core" nature of the image banned. The reference to "simulated" conduct simply brings within the statute's reach depictions of hard core pornography that are "made to look genuine."¹⁰⁹

In other words, the Court believed the CPPA could not distinguish between a hardcore Romeo and Juliet production (protected by the First Amendment) and hardcore, youthful-looking child pornography (arguably unprotected by the First Amendment).¹¹⁰ However, the distinction between the two can be made according to (1) the intrinsic value of the production and (2) the manner in which the product is described. First, the sexually-explicit conduct must be examined within the context of its Romeo and Juliet production. Taken as a whole work, the Romeo and Juliet production clearly has serious literary, artistic, and social value. However, the same cannot be said of hard core, youthful-looking child pornography; such a work has negligible or very slight social value, as it is a stretch of basic reason to consider youthful-looking child pornography seriously artistic or seriously political in that it conveys a clear exposition of ideas to its audience. Second,

¹⁰⁹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (J. Rehnquist, dissenting).

¹¹⁰ I am grateful to Professor Fuchs for raising this worry.

the protection of the explicit Romeo and Juliet work would depend on how it was advertised and described by its producers. If such a work were advertised as portraying child actors having actual sex on stage, then the work would fall under the criminalized distribution under the CPPA. However, if such a work were advertised simply as an explicit version of Romeo and Juliet, then the work would clearly be protected. The context of a serious portrayal of Romeo and Juliet presumes that the actors are adults who are portraying teenage lovers in an explicit scene of lovemaking, and the work's description or manner of advertisement is what bestows protection. Contrarily, typical cases of youthful-looking child pornography have no such serious context. The fact that two eighteen year old adults are airbrushed and engage in actual sex while intentionally portraying children *plus* its description as portraying minors erases the protection of those cases of youthful-looking child pornography.

Second, the Supreme Court argued that because there are no actual child actors involved in either virtual or youthful-looking child pornography, there is no intrinsic relationship between such child pornography and the sexual abuse of children. In other words, there is no inherent harm that results from the distribution of virtual or youthful-looking child pornography. However, the Court inconsistently applies the type of harm that is necessary to invoke the rule of *Ferber*. In *Ashcroft*, the Court used a very narrow definition of "harm" in stating that there was "no harm to any minors" from virtual child or youthful-looking adult porn. However, when the Court criminalized child porn in *Ferber*, it did so based on a much broader scope of "harm." So the Court was inconsistent in what determined harm. Looking back at previously upheld cases, the Court defined "harm" using the following language:

- “...in safeguarding the physical and psychological wellbeing of a minor...”
Globe Newspaper v. Superior Court, 457 US 596
- “...we have sustained legislation aimed at protecting the physical and emotional wellbeing of youth even when laws have operated in the sensitive area of constitutionally protected rights...” *Prince v. Massachusetts*, 312 US 158
- “The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, ...the harm to the child is exacerbated by [the materials’] circulation.” *New York v. Ferber*, 458 US 747

In these descriptions, harm is used in a much broader scope, including “welfare interests” and continued post-production harms through circulation of child pornography. The Court mistakenly examines only the narrow scope of direct physical harm that occurs during production of child pornography. The decision fails to include other possibilities of harm that are likely to result:

- that children may become overly sexualized in their own lives upon learning of the pandering of sexually explicit cartoons of themselves;
- the emotional and psychological dangers to children who resemble or identify with virtual or youthful-looking child pornography.
- the continued aftereffects of pandering youthful-looking child pornography, which is identical to child pornography itself when there is no knowledge of the actors’ ages or consent;

- (Most importantly) ...the effects of child pornography (virtual, actual, or otherwise) on potential abusers of children – twenty years of psychological and sociological studies confirm that even brief exposure to such hard core pornography makes viewers more aggressive towards children, less responsive to suffering of abuse victims, and more willing to accept various myths about child abuse and rape. In one study, 77% of child molesters of boys and 87% of child molesters of girls admitted imitating the sexual behavior they saw modeled in hard core pornography; this modeling of sexually abusive behavior by child molesters after all forms of child pornography is consistent with imitation learning theories in criminology.

Although we may doubt the causal connection between simulated child pornography and these above harms, the Court has long held that such harms need not be *necessarily* causally tied for the legislature to act on likely harms:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature... could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly decided that a legislature could legitimately act on such a conclusion to protect the social interest in order and morality.¹¹¹

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.¹¹²

One final note is necessary. It is possible to think of the problem of commercialized obscenity and child pornography as a problem of reverse-privacy

¹¹¹ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)

¹¹² *Ibid.*

violations. In a very broad sense, privacy is the welfare interest in excluding others from one's personal domains; in a (reversed) sense, privacy is also the welfare interest in not being involuntarily included in the personal domains of others. Individual, community, and governmental welfare interests in privacy are well-established in the liberal society.

As the Court reports from Professor Bickel:

A man may be entitled to read an obscene book in his room, or expose himself indecently there. . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places – discreet, if you will, but accessible to all – with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies*. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.¹¹³

The combination and force of these arguments does not *necessitate* the criminalization of distribution or public displays of youthful-looking or virtual child pornography. Rather, these arguments intend to show how an analysis of harmful offense exposes the criminal law's constitutional and legitimate jurisdiction over the proscription of virtual and youthful-looking child pornography without imposing an unnecessary burden on individual liberty.

¹¹³ Alexander Bickel, "On Pornography: Concurring and Dissenting Opinions," *The Public Interest* 22 (1971), pp. 25 – 26.

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